



employment conditions; and (2) 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>3</sup> The facts and circumstances as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 22, 2000 appellant then a 39-year-old part-time flexible clerk, filed an occupational disease claim (Form CA-2) alleging that she developed constant pain in her neck and down her left shoulder and arm due to the physical stress placed on her back, neck, shoulders, arms, and legs while in the performance of duty. She noted that she first became aware of her claimed condition and its relation to her federal employment on September 9, 2000. On April 13, 2001 OWCP accepted her claim for cervical myofasciitis.<sup>4</sup> On October 8, 2003 it expanded the acceptance of appellant's claim to include the additional condition of major depression disorder, single episode.<sup>5</sup>

On November 21, 2005 appellant returned to full-time light-duty work at the employing establishment. On May 13, 2015 she accepted a part-time position as modified supervisor of customer service.

Beginning on May 9, 2017 appellant filed claims for wage-loss compensation (Form CA-7) for the period January 7 through February 4, 2017 during which she used 160 hours of leave without pay (LWOP) and February 27 through April 21, 2017 during which she used 280 hours of LWOP.

In support of her claims, appellant provided a treatment note dated December 14, 2016 from Dr. Thomas Hodgkiss, Board-certified in diagnostic radiology, noting that she received a medication refill on that date. Dr. Hodgkiss also examined her on January 25, 2017 and provided a medication refill. On March 9, 2017 appellant sought treatment from Dr. Hodgkiss due to left arm and neck pain.

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<sup>3</sup> Docket No. 04-0947 (issued September 28, 2004).

<sup>4</sup> On April 24, 2001 appellant returned to light-duty work for eight hours a day. She stopped work on August 11, 2001 and filed a claim for recurrence (Form CA-2a) alleging total disability due to her accepted September 9, 2000 employment injury. OWCP denied appellant's claimed recurrence of disability by decisions dated October 17, 2001 and February 15, 2002. By decision dated May 9, 2002, it modified its prior decisions finding that her claim should remain open for medical treatment for the accepted condition of cervical myofasciitis, but continued to denying her request for additional wage-loss compensation due to total disability.

<sup>5</sup> Appellant requested reconsideration. By decision dated January 6, 2004, OWCP denied modification of the October 8, 2003 decision. Appellant appealed the January 6, 2004 decision to the Board. By decision dated September 28, 2004, the Board found she had not established that she had developed thoracic outlet syndrome or brachial plexus nerve compression causally related to her federal employment. *Supra* note 3.

In a note dated May 2, 2017, Dr. Michael A. Hinz, a licensed clinical psychologist, reported that appellant had been on medical leave from work since February 10, 2017.

In a May 12, 2017 development letter, OWCP requested additional medical evidence supporting appellant's total disability for work for the period January 7 through February 4, 2017 and February 27 through April 21, 2017. It afforded her 30 days for a response.

In a May 24, 2017 report, Dr. Hinz noted that on September 15, 2016 appellant was informed that she would be assigned back to her previous workstation where her manager had harassed, emotionally abused, demeaned, and created a hostile work environment for her. He reported on February 9, 2017 that she accepted a supervisory position at Gravois station with reservations as she had experienced minor problems with two employees there in the past. Appellant was fearful that she might suffer further harassment from these employees if she went to work at this location. Dr. Hinz opined that being assigned to any associated past abusive situation had a very high probability of resulting in a worsening of appellant's major depression and chronic pain condition. He therefore placed her on medical leave of absence from work beginning February 10, 2017. Dr. Hinz further found that appellant's chronic pain condition did worsen and become unmanageable for several months due to her stress level, depression, weather conditions, and changes in her pain medication. He restricted her from working for a manager who has engaged in using harassment and emotionally abusive behaviors towards her in the past.

On May 25, 2017 Dr. Hinz released appellant to return to work in a non-hostile work setting.

In a June 18, 2017 narrative statement, appellant alleged that the employing establishment failed to make work available for her in keeping with her Equal Employment Opportunity (EEO) settlement. She alleged that this settlement required approval from Dr. Hinz of her return to work, which he denied in his May 24 and 25, 2017 reports. Appellant provided a copy of a settlement agreement, which indicates that she was to return to Gravois Post Office beginning February 18, 2017 and that her work restrictions were to be the same as October 11, 2014. She was also to provide management with a release from Dr. Hinz and then return to light-duty work.

In e-mails dated February 15 through 23, 2017, appellant informed the employing establishment that Dr. Hinz had not released her to return to work as supervisor of customer service, but that she was eager to return to work. She asked if there were other positions available. On March 2, 2017 the employing establishment reported that it had been unable to find any detail assignments. On April 19, 2017 it indicated that it had not yet located a position for appellant.

In a letter dated July 14, 2017, the employing establishment alleged that appellant's claim for compensation from April 22 through June 16, 2017 covered a period of time in which she had intermittent leave usage. It noted that she was paid for 168 hours or \$5,307.19 from April 22 through June 16, 2017 even though she was not at work due to automatic clock rings. The employing establishment further noted that appellant had not worked since September 2016 under OWCP File No. xxxxxx837 which was denied by OWCP in January 2017.

By decision dated July 18, 2017, OWCP denied appellant's claims for compensation for the period January 7 through April 21, 2017. It determined that the medical evidence did not establish disability due to her accepted conditions under this claim.

On September 5, 2017 appellant requested reconsideration of the July 18, 2017 decision. In an August 28, 2017 statement, she disagreed with OWCP's findings and noted that she was seeing Dr. Hinz for her accepted employment-related depression before, during, and after her September 2017 claim. Appellant further asserted that the employing establishment did not have work available within her restrictions due to her accepted employment injuries. She also provided treatment notes dated August 14 and 31 and September 11, 2017 from Dr. Antoine Chami, Board-certified in pain medicine and anesthesiology.

On November 20, 2017 appellant filed additional claims for compensation (Form CA-7) for intermittent LWOP for the period April 22 through July 7, 2017 and August 14 through November 9, 2017. On the accompanying time analysis form (Form CA-7a), she requested LWOP for 2 hours on August 14, 2017; 1.25 hours on September 7, 2017; 8 hours on September 11, 2017; 2.5 hours on September 21, 2017; 2.5 hours on September 28, 2017, 2 hours on October 5, 2017; 1.5 hours on October 12, 2017; 8 hours a day on October 19, as well as October 26 through 28, 2017 due to an adjustment to new medication; and 3 hours on November 9, 2017.

In an October 19, 2017 note, Dr. Chami examined appellant due to cervical pain. Appellant saw him and visited the phlebotomist on November 20, 2017. Dr. Chami examined her on December 15, 2017. On December 19, 2017 he prescribed physical therapy.

By decision dated April 26, 2018, OWCP denied modification of the July 18, 2017 decision finding that the medical evidence of record did not establish total disability from work for the period January 7 through April 21, 2017.

On June 22, 2018 Dr. Hinz provided a list of dates of 22 medical appointments that appellant had attended with him on January 4, 11, 18, and 25, 2017; February 1, 10, and 15, 2017; March 1, 8, 15, and 20, 2017; April 4, 13, and 26, 2017; May 5, 15, 16, 25, and 30, 2017; and June 7, 14, and 21, 2017. On July 5 and 11, 2018 appellant sought medical treatment from Dr. Chami.

By decision dated August 10, 2018, OWCP reopened appellant's claim on its own motion and modified the July 18, 2017 decision to reflect 18 hours of total disability to obtain medical treatment including: August 14, 2017 for two hours; September 11, 2017 for eight hours; and October 19, 2017 for eight hours. It continued to deny her claim for intermittent total disability for the remainder of the periods January 7 through February 2, 2017, April 22 through July 7, 2017, and August 14 through November 9, 2017.

OWCP subsequently received a May 7, 2018 report from Dr. Chami, which noted his examination of appellant's cervical spine and her history of injury. Dr. Chami diagnosed neck pain and cervical radiculopathy.

On September 18, 2018 appellant requested reconsideration of the August 10, 2018 decision. She resubmitted employing establishment e-mails dated March 2, 2017 and Dr. Hinz's May 2, 24, and 25, 2017; and June 22, 2018 reports. Appellant also provided a report dated

November 15, 2017 from Dr. Hinz noting her diagnosis of major depression due to her work-related injury in 2000 and resulting chronic pain. He opined that appellant's work interactions contributed to flares of her chronic pain as well as increased depression. Dr. Hinz also diagnosed panic disorder occurring on September 16, 2016 when she was reassigned to a prior workstation. He noted that appellant returned to work in July 2017, but continued to experience difficulties with her supervisor which aggravated her underlying accepted depression. On October 29, 2018 Dr. Wynndel T. Buenger, Board-certified in anesthesiology and pain medicine examined appellant due to neck and shoulder pain. He diagnosed cervical radiculopathy and cervical disc displacement and provided chronic opioid therapy. Dr. Buenger also prescribed physical therapy.

On November 8, 2018 Dr. Hinz provided a list of appointments that appellant attended from September 27 through November 5, 2018. On November 19, 2018 he indicated that appellant sought medical treatment on November 14 and 19, 2018.

On November 26, 2018 Dr. Buenger examined appellant due to left shoulder and neck pain. He diagnosed cervical radiculopathy and cervical disc displacement. Appellant also received a prescription from Dr. Buenger's office on that date.<sup>6</sup> On December 7, 2018 Dr. Hinz indicated that he examined appellant on November 28, and December 3, 2018 due to depression.

On December 7, 2018 appellant filed a claim for compensation (Form CA-7) for intermittent disability during the period October 27 through December 7, 2018. On the accompanying time analysis forms (Form CA-7a) she indicated that she used eight hours of LWOP on October 27, 2018, but was not claiming compensation for that date. Appellant claimed four hours of LWOP on October 29 and 31, 2018 for doctor's appointments. She also indicated that she claimed four hours of LWOP on November 5, 2018 for a doctor's appointment. Appellant claimed eight hours of LWOP on November 14, 19, 26, 28, and December 3, 2018 due to two doctor's appointments on each of those dates, and four hours of LWOP due to doctor's appointments on November 16, 21, and 30, 2018 as well as December 7, 2018.<sup>7</sup>

On December 26, 2018 appellant submitted a listing of her physical therapy appointments on November 14, 16, 19, 21, 28, and 30 and December 3, 7, 10, 12, 17, and 19, 2018.

On January 8, 2019 OWCP authorized 12 hours of compensation for the period October 29 through November 5, 2018; 8 hours of compensation for November 14, 19, and 28, 2018, 4 hours of compensation for November 16, 21, 26, and 30, 2018 as well as December 7, 2018.

In a development letter dated January 9, 2019, OWCP requested additional medical evidence in support of appellant's claimed disability for eight hours on October 27 and November 15, 2018 as well as an additional four hours on November 26, 2018. It noted that Ms. Charles had provided treatment on November 26, 2018 entitling appellant to four hours of compensation for that date. OWCP afforded appellant 30 days to respond.

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<sup>6</sup> This note is signed by Candace D. Charles, a physician assistant.

<sup>7</sup> Appellant noted that she was in a LWOP status for eight hours on November 17, 2018.

On January 24, 2019 appellant submitted documentation that she received physical therapy treatment on November 14, 16, 19, 21, 28, and 30, 2018; December 3, 7, 10, 12, 17, 19, 21, 26, and 28, 2018; and January 2, 3, and 4, 2019.

By decision dated February 13, 2019, OWCP denied appellant's claim for compensation for eight hours on October 27 and November 15, 2018 and for the remaining four hours on November 26, 2018.

By decision dated February 20, 2019, OWCP denied appellant's September 18, 2018 request for reconsideration of the merits of the August 10, 2018 decision concerning the denial of her compensation for the periods January 7 through April 21, 2017; April 22 through July 7, 2017; and from August 14 through November 9, 2017.

### **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 by the weight of the evidence.<sup>8</sup> For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.<sup>9</sup> Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.<sup>10</sup>

Under FECA the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.<sup>11</sup>

OWCP's procedures provide that wages lost for compensable medical examination or treatment may be reimbursed.<sup>12</sup> A claimant who has returned to work following an accepted injury or illness may need to undergo examination, testing, or treatment and such employee may be paid compensation for wage loss while obtaining medical services or treatment, including a reasonable time spent traveling to and from the medical provider's location.<sup>13</sup> Wage loss is payable only if the examination, testing, or treatment is provided on a day which is a scheduled workday and during a scheduled tour of duty. Wage-loss compensation for medical treatment received during

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<sup>8</sup> *D.W.*, Docket No. 18-0644 (issued November 15, 2018).

<sup>9</sup> *B.O.*, Docket No. 19-0392 (issued July 12, 2019).

<sup>10</sup> 20 C.F.R. § 10.5(f); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

<sup>11</sup> *Id.*

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Wages Lost for Medical Examination or Treatment*, Chapter 2.901.19 (February 2013).

<sup>13</sup> *Id.* at Chapter 2.901.19(a); *E.W.*, Docket No. 17-1988 (issued January 28, 2019).

off-duty hours is not reimbursable.<sup>14</sup> The evidence should establish that a claimant attended an examination or treatment for the accepted work injury on the dates claimed in order for compensation to be payable.<sup>15</sup> For a routine medical appointment, a maximum of four hours may be allowed. However, longer periods of time may be allowed when required by the nature of the medical procedure and/or the need to travel a substantial distance to obtain medical care.<sup>16</sup>

### ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish intermittent disability for the period October 27 through November 26, 2018, causally related to the accepted employment conditions.

On her claim for compensation (Form CA-7) and time analysis forms (Form CA-7a) dated December 7, 2018 appellant indicated that she was in a LWOP status for eight hours on October 27, 2018, but was not claiming compensation for this date. Likewise, appellant did not claim disability on November 15, 2018 despite claiming eight hours of LWOP on this date. Furthermore, as the record contains no medical evidence establishing that appellant underwent medical treatment on these dates, the Board finds that she is not entitled to wage-loss compensation on those two days.<sup>17</sup>

Appellant also alleged on the Form CA-7a that she was entitled to eight hours of compensation on November 26, 2018, as she attended two medical appointments on this date. The record reflects that OWCP paid appellant for four hours for her medical appointment on November 26, 2018 with Dr. Buenger.<sup>18</sup> Regarding the additional four hours claimed on November 26, 2018, the medical evidence of record does not establish that appellant attended any other medical appointment or was disabled from work during this time frame as a result of the accepted employment injuries.<sup>19</sup>

The only medical evidence which addressed appellant's disability on November 26, 2018 was the November 26, 2018 notes from Dr. Buenger indicating that he examined appellant due to left shoulder and neck pain diagnosing cervical radiculopathy and cervical disc displacement. Dr. Buenger's office also provided appellant with a prescription for E-Stim on that date. As the evidence of record did not substantiate a need for more than four hours of compensation for

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<sup>14</sup> *Id.* at Chapter 2.901.19(a)(2).

<sup>15</sup> *Id.* at Chapter 2.901.19(a)(3).

<sup>16</sup> *Id.* at Chapter 2.901.19.c; *T.S.*, Docket No. 19-0347 (issued July 9, 2019).

<sup>17</sup> *T.S.*, *id.*

<sup>18</sup> In order to establish entitlement to compensation for any time missed from work due to medical treatment for an employment-related condition, a claimant must submit supporting medical evidence. *B.O.*, *supra* note 9; *S.H.*, Docket No. 18-1634 (issued May 13, 2019); *Dorothy J. Bell*, 47 ECAB 624 (1996); *Zane H. Cassell*, 32 ECAB 1537 (1981).

<sup>19</sup> *B.O.*, *supra* note 9; *G.T.*, 59 ECAB 447 (2008); *Huie Lee Goal*, 1 ECAB 180, 182 (1948).

appellant's routine medical appointment, appellant has not established entitlement to additional wage-loss compensation due to medical treatment on November 26, 2018.<sup>20</sup>

As noted above, appellant has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that her claimed intermittent disability from work for the period October 27 to November 26, 2018, was causally related to the accepted employment injuries.<sup>21</sup> She has not done so. Therefore, appellant has not met her burden of proof.

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 vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.<sup>22</sup>

A timely request for reconsideration, including all supporting documents, must set forth arguments and contain evidence that 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>23</sup> When a timely request for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request, without reopening the case for a review on the merits.<sup>24</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>25</sup> If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>26</sup> If the request is timely, but fails to meet at least one

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<sup>20</sup> *B.O.*, *supra* note 9.

<sup>21</sup> *R.H.*, Docket No. 18-1382 (issued February 14, 2019); *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

<sup>22</sup> 5 U.S.C. § 8128(a); *V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

<sup>23</sup> 20 C.F.R. § 10.606(b)(3).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at § 10.607(a).

<sup>26</sup> *Id.* at § 10.608(a); *H.H.*, Docket No. 18-1660 (issued March 14, 2019); *M.S.*, 59 ECAB 231 (2007).

of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>27</sup>

OWCP's procedures provide a timeliness goal for issuing reconsideration decisions within 90 days from the receipt of the request.<sup>28</sup> When a reconsideration decision is delayed beyond 90 days, and the delay jeopardizes the claimant's right to review of the merits of the case by the Board, OWCP should conduct a merit review.<sup>29</sup>

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

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

The last merit decision on this issue was OWCP's August 10, 2018 decision, which denied appellant's claim for intermittent total disability for the periods January 7 through February 2, April 22 through July 7 and August 14 through November 9, 2017. On September 18, 2018 appellant requested reconsideration of the August 10, 2018 decision. By decision dated February 20, 2019, OWCP denied appellant's reconsideration request. The Board notes that OWCP's February 20, 2019 nonmerit decision was issued 155 days after appellant's request for reconsideration. As noted above, OWCP's procedures provide a timeliness goal for issuing reconsideration decisions within 90 days from the receipt of the request.<sup>30</sup> When a reconsideration decision is delayed beyond 90 days, and the delay jeopardizes the claimant's right to review of the merits of the case by the Board, OWCP should conduct a merit review.<sup>31</sup> As a claimant has only 180 days to appeal final adverse OWCP decisions to the Board,<sup>32</sup> appellant's right to appeal the August 10, 2018 decision expired on February 6, 2019, approximately two weeks before OWCP issued its February 20, 2019 nonmerit decision. The Board therefore finds that OWCP's delay in issuing a decision on appellant's reconsideration request precluded her right to appeal its most recent merit decision to the Board.<sup>33</sup> The case must therefore be remanded to OWCP for issuance of an appropriate decision on the merits of the claim in order to preserve appellant's appeal rights.

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<sup>27</sup> *Id.* at § 10.608(b); *D.N.*, Docket No. 18-1630 (issued March 7, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>28</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.7(a) (October 2011).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> 20 C.F.R. § 501.3(e).

<sup>33</sup> *L.F.*, Docket No. 17-1206 (issued April 18, 2019). See *K.A.*, Docket No. 16-1392 (issued November 7, 2016) (OWCP substantially jeopardized appellant's appeal rights when OWCP's delay in issuing a decision on the reconsideration request left appellant with only 70 days to appeal from the last merit decision).

**CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish intermittent disability for the period October 27 through November 26, 2018 causally related to the accepted employment conditions. The Board further finds that the case is not in posture for decision on the issue of OWCP's denial of appellant's September 18, 2018 request for reconsideration under 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 13, 2019 decision of the Office of Workers' Compensation Programs is affirmed. The February 20, 2019 nonmerit decision is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: December 3, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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