

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

L.B., Appellant)	
)	
and)	Docket No. 12-1617
)	Issued: June 25, 2013
DEPARTMENT OF TRANSPORTATION,)	
FEDERAL AVIATION ADMINISTRATION,)	
Olathe, KS, Employer)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 23, 2012 appellant filed a timely appeal from a January 25, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. As OWCP has not issued a merit decision within 180 days of the filing of this appeal, the Board lacks jurisdiction to review the merits of this case pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3

ISSUE

The issue is whether OWCP properly denied appellant's request to reopen her case for further review of the merits under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 5, 2010 appellant, then a 46-year-old air traffic control specialist, filed a traumatic injury claim alleging that on April 29, 2010 she sustained post-traumatic stress disorder as a result of harassment and intimidation in the course of her federal employment. She stopped work on April 29, 2010. In support of her claim, appellant submitted evidence regarding her charges of harassment by coworkers prior to April 29, 2010 and the employing establishment's investigations into her complaints.

By decision dated August 12, 2010, OWCP denied appellant's emotional condition claim. It adjudicated her claim as an occupational disease and found that she had not established any compensable employment factors. OWCP discussed appellant's allegation that on April 29, 2010 a coworker wrongly accused her of deviating into his sector in retaliation for her accusing him of harassment. It determined that she had not established the occurrence of the April 29, 2010 incident.

On August 18, 2010 appellant requested an oral hearing before an OWCP hearing representative. At the telephone hearing, held on December 15, 2010, appellant's representative specified that she was claiming a traumatic injury on April 29, 2010 rather than an occupational disease. He related that while performing her work duties appellant was accused of an operational error. Counsel explained that an operational error occurs when an air traffic controller fails to follow federal regulations for preventing encroachment by an aircraft on another aircraft's airspace. He noted that the employing establishment investigated the incident and found that the error did not occur. Counsel maintained that appellant's stress due to the incident was compensable as it occurred as part of her regular work duties. Appellant believed that the incident arose "intentionally in an attempt to intimidate and retaliate against her..." Counsel related that the employing establishment timely investigated and resolved the inappropriate workplace activity that occurred prior to April 29, 2010. He noted that appellant was reassigned after the April 29, 2010 incident and had to complete new training and obtain medical certification to return to her duties as an air traffic controller. At the hearing, appellant related that on April 29, 2010 she was acting as a training instructor when another controller accused her of deviating aircraft into his airspace. She found no evidence of an error but became shaking and nauseous. At the hearing Gerald B. Schwartz, the acting air traffic manager at the employing establishment, related that he spoke with her on April 29, 2010 and advised her to file a traumatic injury claim. He indicated that he was not controverting the claim or disagreeing in any way with appellant's claim as set forth "either today or in the past month." Edward Townend, a union representative, related that on April 29, 2010 he spoke with appellant and Mr. Schwartz regarding concerns that the report of the deviation was retaliatory.

In a decision dated February 7, 2011, OWCP's hearing representative affirmed the August 12, 2010 decision as modified to show that appellant had established that on April 29, 2010 she was performing her specially assigned work duties as a training instructor when she experienced stress working at her sector. She found that appellant's reaction to being accused of an operational error that was later found to be a nonoccurrence and her removal from her duties was not compensable as it was an administrative duty of the employing establishment. The hearing representative also determined that appellant had not established that the April 29, 2010 incident occurred as a result of harassment or retaliation. She found that the medical evidence

attributed appellant's emotional condition to being accused of an operational error by a coworker in retaliation for her accusations of harassment rather than the compensable work factor. Consequently, the hearing representative found that appellant had not met her burden of proof to establish an emotional condition causally related to factors of her federal employment.

On December 15, 2011 appellant requested reconsideration. She maintained that OWCP's hearing representative erred in finding that she had not established her allegation of harassment and retaliation on the April 29, 2010. Appellant noted that the employing establishment corroborated that the harassment occurred as alleged. She cited interviews between the employing establishment and female coworkers concerning a time period prior to April 29, 2010 as evidence of harassment. Appellant asserted that Greg Stephens, a coworker, alleged that she committed an operational error after she accused him of misconduct. She maintained that Mr. Schwartz, the manager of the station, testified at the hearing that he was not controverting the claim. Appellant also noted that on April 29, 2010 Mr. Townsend discussed with Mr. Schwartz that the operational error allegation appeared retaliatory. She related that after the incident management made Mr. Stephens read an accountability order defining retaliation. Appellant specified that she attributed her stress to the April 29, 2010 work incident rather than the employing establishment's investigation of her removal from her work duties. She cited Board cases supporting that an operational error constituted a compensable employment factor. Appellant questioned why the hearing representative did not consider the medical evidence from her attending physician.

In a statement dated December 14, 2011, Neal Thigpen, an air traffic controller and workers' compensation representative for the union, related that he spoke with Mr. Schwartz on August 24, 2010 regarding the April 29, 2010 incident. Mr. Schwartz described actions he had taken to prevent retaliation in the future and "praised [appellant] for her courage in taking a stance in [an] effort to prevent future female controllers from suffering as she had." He told Mr. Thigpen that he did not dispute the validity of appellant's claim and agreed to attend the hearing.

In a statement dated December 14, 2011, Scott Barnes, an air traffic controller and husband of appellant, related that Mr. Schwartz agreed at a meeting on April 29, 2010 that Mr. Stephens' allegation that appellant committed an operational error seemed to be retaliation. In an August 24, 2010 meeting, Mr. Schwartz indicated that he "was in no way controverting [appellant's] claim for OWCP benefits...." He described his actions taken to educate managers and subordinates on punishment for anyone who "retaliates against another employee for making a protected report of inappropriate activity."

By decision dated January 25, 2012, OWCP denied appellant's request for reconsideration after finding that the evidence submitted was irrelevant and thus insufficient to warrant reopening of her case for further merit review.² It determined that the relevant issue was whether the medical evidence established that she sustained an emotional condition causally related to the accepted work factor.

² OWCP referenced a May 13, 2010 finding by the employing establishment that there was insufficient evidence that appellant was harassed or discriminated against; however, this finding is relevant to events preceding April 29, 2010.

On appeal, appellant argues that the April 29, 2010 incident occurred following her allegation of harassment to management. She maintains that Mr. Stephens retaliated against her when he alleged that she committed an operational error. Appellant asserts that he, the acting air traffic manager at the facility, agreed that Mr. Stephens' actions were retaliatory and did not controvert her claim. She further maintains that the affidavits she submitted from Mr. Thigpen and Mr. Barnes constituted new and relevant evidence. Appellant cited Board cases finding that an operational error constituted a compensable work factor. She argues that she submitted sufficient medical evidence to establish her claim.

LEGAL PRECEDENT

To require OWCP reopen a case for merit review under section 8128(a) of FECA³ the OWCP's regulations provide that 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) submit relevant and pertinent new evidence not previously considered by OWCP.⁴ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁵ 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.⁶

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his burden of proof.⁷ The requirements pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.⁸ If OWCP should determine that the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.⁹

ANALYSIS

On February 7, 2011 OWCP's hearing representative found that appellant had established as a compensable work factor that she experienced stress performing her duties as a training instructor on April 29, 2010. She determined, however, that the medical evidence was

³ *Supra* note 1. Section 8128(a) of FECA provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application."

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(b).

⁷ *Donald T. Pippin*, 53 ECAB 631 (2003).

⁸ *Id.*

⁹ *See Annette Louise*, 53 ECAB 783 (2003).

insufficient to show an emotional condition due to the compensable work factor. The hearing representative noted that the medical evidence attributed appellant's emotional condition to her belief that she was accused by a coworker of an operational error on April 29, 2010 in retaliation for her complaint of harassment. Appellant requested reconsideration. In its January 25, 2012 decision denying her request for reconsideration, OWCP found that she had not raised an argument or submitted evidence sufficient to warrant reopening of her case for further merit review. It determined that the relevant issue was whether appellant had submitted medical evidence sufficient to show that she sustained an emotional condition causally related to the accepted work factor.

The Board finds that appellant has submitted new evidence that is intended to further support her assertion that the coworker was retaliating against her for her previous Equal Employment Opportunity claim when he accused her of deviation. The evidence consisted of statements from appellant, Mr. Thigpen and Mr. Barnes which reported that Mr. Schwartz also believed that the coworker acted out of retaliation. These statements are relevant and pertinent to the issue of whether her coworker accused her of an operational error in retaliation for her charge of harassment.

In a statement dated December 14, 2011, Mr. Thigpen asserted that on August 24, 2010 Mr. Schwartz discussed with him the April 29, 2010 incident and how he was going to prevent future retaliatory actions. Mr. Schwartz indicated that he did not dispute appellant's claim. In another December 14, 2011 statement, Mr. Barnes indicated that on April 29, 2010 Mr. Schwartz agreed that the charge of an operational error appeared retaliatory. In order to require merit review, it is not necessary that the new evidence be sufficient to discharge appellant's burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.¹⁰ As the December 14, 2011 statements constituted new and relevant evidence pertaining to whether appellant established retaliation or harassment on April 29, 2010 as a compensable work factor, the Board finds that OWCP improperly denied her request for review of the merits of the claim. The case will be remanded to OWCP to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, it should issue a merit decision on the claim.

CONCLUSION

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

¹⁰ See *supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the January 25, 2012 merit 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: June 25, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board