

FACTUAL HISTORY

On January 10, 2018 appellant, then a 57-year-old occupational therapist, filed an occupational disease claim (Form CA-2) alleging that he sustained stress, anxiety, and a physical illness due to factors of his federal employment, including harassment and inappropriate personnel actions. He indicated that he first became aware of his conditions on January 7, 2015 and first realized that they were caused or aggravated by his federal employment on January 14, 2015. On the reverse side of the claim form, the employing establishment indicated that appellant first reported his conditions on January 14, 2015, and that appellant was last exposed to the conditions alleged to have caused his conditions on January 14, 2015.

In a January 8, 2018 narrative statement, appellant alleged that during his work at the employing establishment he had assisted in the care of thousands of veterans in stressful and heart-wrenching situations as his patients suffered serious and sometimes unexpected declines in health. He also alleged that he was subjected to periodic inappropriate behavior from employing establishment staff and administration and periodic abuse and disrespect from patients. Appellant related that he suffered periodic stress and stress-related symptoms for 12 years during his time as an employee at the employing establishment. He further related that his stress started after K.D. had been his supervisor for a few years, and that she caused most of his stress. K.D.'s inappropriate actions caused him to fear that she would do something that would place him in an unethical or illegal situation. Appellant indicated that K.D. took credit for his contributions and issued baseless verbal and written counseling. He stated that he grieved nearly a dozen of her actions and had been successful in mitigating or overturning all but one. Appellant related that K.D. retaliated against him by inappropriately removing him from patient care for 14 months and suspending him without pay. During this time he sat alone in a room with little work to do and spent his time worrying about being disciplined or fired. Appellant began to suffer stress-related ailments such as headaches, nausea, anxiety, sleeplessness, shortness of breath, and neck and chest pain, and the severity of his symptoms correlated with the severity of his work issues. He related that three months after he was removed from patient care he was organizing e-mails from K.D. demonstrating that she harassed and intimidated him when he experienced severe chest pain and had a heart attack. Appellant noted that even when he returned to patient care in February/March 2016 K.D. and P.N. continued to harass, intimidate, and file baseless claims against him which were all ultimately rescinded. He related that after many hurdles he was able to overturn his suspension and he received a settlement.

An undated formal grievance against K.D. by appellant alleged that K.D. engaged in the exploitation of students and employees, and unethical, biased, and/or negligent practices. He indicated that on March 31, 2014 she removed a staff member from his clinic, leaving him by himself and creating foreseeable safety, scheduling, and patient care issues. Appellant related that K.D. removed the staff member because appellant was a man and K.D. thought that he did not deserve the same safety considerations as women. He also complained about a decision made by K.D. on April 1, 2014 to move him from one clinic to another, which caused him stress.

A November 3, 2014 informal grievance e-mail from appellant sent to K.D. and copied to P.N., K.D.'s supervisor, indicated that while K.D. implied that his debates with other employees were disrespectful, his intent was to correct irresponsible behavior, negligence, and diminished quality of care. Appellant noted that she rated him as not meeting standards involving respecting

traditions, practices, competencies, and responsibilities of different professions, but failed to provide any examples and also violated these standards herself by instructing employees to bill fraudulently, hospitalizing patients longer than necessary, and providing patients with unnecessary and potentially harmful equipment. He also related that K.D. rated appellant as not meeting the standards involving maintaining high standards and continuing competence in practice, education, and research even though he was always current on required continuing education, was one of two people on staff who was certified as a clinic instructor within the past two years, participated in a weekend class to gain more firsthand knowledge, and ran the rehabilitation program where knowledge of diverse conditions was required. Appellant additionally related that he constantly provided education to other staff members. He noted that K.D. rated him as not meeting the standards involving adjusting professional behavior according to feedback from patients, colleagues, and supervisors. Appellant indicated that his patients rarely critiqued him and he indicated that he did adjust his behavior based upon feedback. He further indicated that K.D. generally criticized his communication style in her evaluations, but then had to rerate him with a higher score due to lack of evidence. Appellant listed additional categories where K.D. indicated that he failed to meet the standards and pointed out that she had insufficient or no evidence to support her assessment. He accused her of unethical behavior, including favoring females.

OWCP received an undated formal grievance by appellant regarding his 14-day suspension issued on December 7, 2015. Appellant indicated that the suspension violated labor policies set by the union because it was an adverse action without progressive discipline, violated employing establishment policies, had no factual basis, and was biased because colleagues who engaged in similar behaviors that actually led to injury or death did not receive similar discipline. He contended that K.D.'s December 18, 2015 report, which contained the bulk of the evidence that his suspension was based on, was inaccurate and biased. Appellant related that K.D. displayed gender-based bias towards him for the past decade and retaliated against him for refusing to engage in illegal or unethical conduct. He additionally alleged that she harassed him by indicating that he was sick too often and threatened an administrative action and also failed to provide him with the proper information regarding how to receive compensation for work-related injuries. Appellant additionally detailed allegations regarding K.D.'s retaliation for appellant's refusal to engage in illegal or unethical conduct involving billing and patient care, evaluations, and privacy. He related that K.D. failed to keep her agreement that stated that if he changed workspaces he would get his choice of assignments. Appellant also alleged that his colleague J.M. made sexual innuendos towards him and possibly sexually harassed him once at work and once at a nonwork event.

OWCP received numerous e-mails from appellant to his supervisor, K.D., which he alleged established harassing behavior or error and abuse on the part of K.D.

A November 20, 2009 e-mail from K.D. to another employee requested that the employee impress upon appellant and another employee that they had to be at work while K.D. was on leave. A November 20, 2009 response e-mail from appellant indicated K.D.'s statements implied certain things and denigrated his professionalism. K.D. responded in an e-mail indicating that it was her job to insure adequate coverage.

A December 15, 2009 e-mail from appellant to K.D. requested information regarding allegations against him. He stated that K.D. mentioned that another employee was going to write

a statement regarding certain allegations, but he indicated that he was never provided with the statement.

A May 24, 2010 e-mail from appellant to K.D. related that her denial of his sick leave request appeared to be retaliatory. Appellant stated that there was a clear difference in the way he was treated prior to his Equal Employment Opportunity (EEO) complaint and after he filed his complaint, which he indicated was *prima facie* evidence of retaliation. A May 24, 2010 e-mail from K.D. to appellant indicated that she apologized if she appeared unfair, and that she meant to convey that having staff available to cover staffing needs was most important.

A July 10, 2010 e-mail from appellant to K.D. indicated that appellant objected to his proposed workspace move. In this e-mail appellant also indicated that K.D. was very unprofessional as she had called appellant a ba***rd in front of other employees, stated that all men are pigs in front of him, and referred to “all little brothers” in derogatory terms in her e-mails to employees. Appellant also related that K.D. wrote inappropriate comments in his reviews, refused to investigate false accusations against him, and attempted to deny him sick leave for medical procedures. He also alleged that she provided praise and cash awards to female employees for the same actions he performed, announced his rotation without his consultation, complained that he was sick too often, and threatened to fire him over lack of productivity.

A July 16, 2010 e-mail from K.D. to appellant indicated that due to the severity of the accusations leveled against her in appellant’s e-mail, she referred the matter to P.T. for an investigation. K.D. indicated that she still expected appellant to rotate to a new workspace for two months.

A November 3, 2014 e-mail from K.D. to P.N. indicated that she would provide documentation per appellant’s request of specific examples of why she provided certain ratings to appellant. Appellant noted that K.D. never provided him with said documentation.

A November 21, 2014 e-mail from K.D. responding to appellant’s informal grievance indicated that per his request she included his comments in his performance appraisal and changed his ratings of unsatisfactory and not fully successful to fully successful.

A January 6, 2015 e-mail from appellant to K.D. indicated that he was anxious, sick to his stomach, and unable to focus due to bias and incompetence he was experiencing at work and he requested information regarding how to label his time off as work related. On the same date, K.D. responded that it was her understanding that his situation was not considered a work-related injury. She indicated that he could talk to human resources regarding work-life balance issues.

A January 14, 2015 e-mail from appellant to K.D. indicated that since he received his new temporary sedentary assignment he had worked almost exclusively on the computer and developed ailments related to the nature of the assignment including overall deconditioning, anxiety, nausea, periodic chest and neck pain, headaches, and shortness of breath. He requested an alternative temporary assignment for at least a few days that was something other than sitting at a computer. A January 14, 2015 e-mail from K.D. to appellant suggested that appellant update the storeroom and reminded him to take breaks during the course of his workday.

A February 3, 2015 e-mail from appellant to K.D. stated that “all of this early abuse” caused his headaches, nausea, and shortness of breath.

D.H., a colleague of appellant’s, indicated in an August 18, 2015 letter that he had known appellant for 10 years and characterized him as friendly. He further indicated that appellant handled the stressful situation of his removal from patient care well and noted that he experienced a heart attack. An August 28, 2015 letter from M.H., a colleague of appellant’s, indicated that she had also known appellant for 10 years and participated in social outings with him and fellow employees. She stated that he experienced stress with his job reassignment to nonpatient care that was compounded by a heart attack. A September 2, 2015 letter from C.W., a colleague of appellant’s, indicated that she had known appellant since 2003 and he was a professional and sincere therapist who prioritized patients. She noted that he was pleasant, knew how to interact with a crowd, and was a pleasure to work with.

Dr. Lyndee Taketa, a clinical psychologist, indicated in a November 21, 2017 letter that appellant had been a patient from May 2015 to the present. She noted that he was initially seen for anxiety and depression in relation to a heart attack and issues involving work. Dr. Taketa related that appellant indicated that he had a history of filing grievances against his supervisor. She also indicated that he was removed from patient care in 2014 for 14 months and placed somewhere without necessary work supplies. Dr. Taketa added that he was suspended from work, but his suspension was eventually overturned, and he received a settlement. She opined that appellant experienced anxiety due to the length of the process of appealing his suspension, his treatment from coworkers, and his interactions with administrators.

In a January 29, 2018 development letter, OWCP informed appellant that additional evidence was required to establish his claim. It advised him of the type of factual and medical evidence necessary and attached a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

By decision dated June 8, 2018, OWCP denied appellant’s emotional condition claim, finding that the evidence of record was insufficient to establish that the employment factors occurred as alleged. It explained that the only evidence provided to substantiate his allegations were statements that he authored. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On May 29, 2019 appellant requested reconsideration. In an accompanying letter, he indicated that in its June 8, 2018 decision OWCP did not properly evaluate the evidence he provided, including medical evidence. Appellant related that while OWCP’s decision stated that he failed to provide factual documentation aside from his own statements, he did not have to provide documentation or evidence other than his statements to prove the abuses he suffered, as his statements were evidence. He also indicated that he provided evidence supporting his statements in the form of e-mails, administrative documents, and personal testimonials from other employing establishment employees which demonstrated that he was subjected to administrative abuses for over a decade, and that the abuses culminated in his supervisor illegally removing him from patient care and suspending him. Appellant noted that OWCP had not obtained evidence rebutting his allegations.

Appellant resubmitted the first page of his undated formal grievance regarding his 14-day suspension.

By decision dated June 24, 2019, OWCP denied appellant's request for reconsideration of the merits of the claim under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

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.²

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (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.³

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁴ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁵ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁶

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). In his timely request for reconsideration, appellant contended that OWCP found in its June 8, 2018 decision that the evidence of record was insufficient to establish fact of injury because the only factual documentation appellant had provided to substantiate his allegations were his own statements, but he had in fact provided evidence that supported his allegations from colleagues and his psychologist. Appellant argued that OWCP mistakenly denied his claim finding that claim could not be accepted because the

² 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also 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).

³ 20 C.F.R. § 10.606(b)(3); *see L.D.*, *id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁴ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the originally contested decision. 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.

⁵ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁶ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

evidence of record only consisted of his own allegations, and appellant alleged that OWCP had not properly developed his claim.

OWCP's procedures provide that in certain types of claims, such as a stress claim, a statement from the employer is imperative to properly develop and adjudicate the claim.⁷ Its procedures further explain that "when an incident or incidents are the alleged cause of disability, the [claims examiner (CE)] must obtain from the claimant, agency personnel and others, such as witnesses to the incident, a statement relating in detail exactly what was said and done. If any of these statements are vague or lacking detail, the responsible person should be requested to submit a supplemental statement clarifying the meaning or correcting the omission."⁸ Its regulations further provide that an employer who has reason to disagree with an aspect of the claimant's allegations should submit a statement that specifically describes the factual argument with which it disagreed and provide evidence or argument to support that position.⁹

The Board therefore finds that appellant has advanced a new and relevant legal argument in that OWCP failed to request that the employing establishment respond to his claim.

As appellant has advanced a new and relevant legal argument, appellant is entitled to a review of the merits of the claim under section 10.606(b)(3) of OWCP's regulations.¹⁰ Following such further development as deemed necessary, OWCP shall issue an appropriate merit decision regarding appellant's emotional condition claim.

⁷ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.7(a)(2) (June 2011).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.17(j) (July 1997); see also *D.B.*, Docket No. 18-0537 (issued September 12, 2018).

⁹ 20 C.F.R. § 10.117(a).

¹⁰ *T.P.*, Docket No. 18-0608 (issued August 2, 2018). See *L.K.*, Docket No. 15-0659 (issued September 15, 2016); *T.L.*, Docket No. 16-0536 (issued July 6, 2016).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 24, 2019 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 21, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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