

**COMBINING REMEDIES FOR FEDERAL EMPLOYEES –**  
**RESEARCH NOTES**

(Last updated 08/15/04)

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**1. Tort law suits against Agency employees versus workers’ compensation (FECA)**

FECA does not bar tort lawsuits against co-employees. *Bates v. Harp*, 573 F.2d 930 (6th Cir., 1978); *Heathcoat v. Potts*, 790 F.2d 1540 (11th Cir., 1986); *Saltsman v. United States*, 104 F.3d 787 (6th Cir. 1997); *Guidry v. Durkin*, 834 F.2d 1465, 1471 (9th Cir. 1987)(federal employee defamed by co-employee). Co-employees and supervisors will be immune from such suits, however, if the Agency certifies that they were acting in the “scope” of their employment when the incident occurred. See *Salazar v. U. S. Postal Service*, 929 F.Supp. 966 (E.D.Va. 1996)(tort claims of assault and battery and

defamation; case discusses the procedure of certifications that individual employees originally sued by Plaintiff in tort were acting within the scope of their employment, substitution of the United States for the Postal Service defendant and the individual defendants under 28 U.S.C. §2679(d)(1) [“Westfall Act”], removal from state to federal court, motion for dismissal for failure to comply with FTCA administrative claim requirement, etc.).

For tort claims involving emotional or physical injury, such a “scope” certification will result in the employer (the United States) being found responsible for the tort instead. A federal employee, however, cannot sue the United States in tort for a work-related injury, because of the workers’ compensation bar contained in FECA. 5 U.S.C. §8116(c). Therefore, if the “scope” assertion by the government is upheld by the court, the injured federal employee will be left without a tort remedy against anyone – unless there is a third party involved.

The relevant part of FECA, 5 U.S.C. §8116(c), provides that:

“The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen’s compensation statute or under a Federal tort statute. However, this subsection does not apply to a master or a member of a crew of a vessel.”

If there is a “substantial question” whether a federal employee’s tort claim might be a claim for emotional or physical injury against the government pre-empted by FECA, the tort claim will be dismissed pending OWCP’s determination of that issue. *Figueroa v. U.S.*, 7 F.3d 1405, 1408 (9<sup>th</sup> Cir. 1993). If FECA coverage is found to exist, the tort claim against the United States is pre-empted.

## **2. Tort lawsuits against individual Agency employees versus discrimination remedies against the employer**

A federal employee may sue co-employees or supervisors personally in tort for damages, where they are guilty of “highly personal wrongs”. *Arnold v. U.S.*, 816 F.2d 1306 (9<sup>th</sup> Cir., 1987)(holding the Title VII is not the exclusive remedy for federal employees who suffer “highly personal” wrongs, such as defamation, harassing phone calls, and physical abuse, and that both a Title VII complaint and a tort remedy are available); *Otto v. Heckler*, 781 F.2d 754, amended by 802 F.2d 337 (9<sup>th</sup> Cir. 1986) (holding that “When the harms suffered involve something more than discrimination, the

victim can bring a separate claim.”); *Stewart v. Thomas*, 538 F.Supp. 891, 895 (D.D.C. 1982).

In effect these defendants have done something that cannot be considered within the course and scope of their federal employment - for example, rape of a subordinate by a supervisor – and the employer may also be held liable in tort for negligent supervision. See, e.g., *Brock v. U.S.*, 64 F.3d 1421 (9<sup>th</sup> Cir. 1995), summarized by the Court as follows: “Forest Service employee brought action under Federal Tort Claims Act (FTCA). The United States District Court for the Eastern District of Washington, James B. Hovis, United States Magistrate Judge, dismissed action, and employee appealed. The Court of Appeals, Brunetti, Circuit Judge, held that: (1) Title VII did not bar claim alleging negligent supervision of superior who allegedly raped employee; (2) Title VII barred negligent supervision claim based on coworkers' alleged retaliation; (3) Civil Service Reform Act (CSRA) did not preempt claim arising out of superior's alleged conduct; and (4) assault and battery exception to FTCA did not bar claim with respect to supervision of superior.” The Ninth Circuit had previously held that the assault and battery exception of the Federal Tort Claims Act does not immunize the Government from liability to non-employees for negligently hiring and supervising an employee. *Bennett v. United States*, 803 F.2d 1502, 1504 (9<sup>th</sup> Cir. 1986) (parents of children sexually abused by teacher at BIA school could bring tort claim).

Note that although Title VII may not bar a claim against the government for a tort like negligent supervision, FECA does bar such a claim brought by a federal employee (see **topic 1** above).

28 U.S.C. §2679(b)(1) provides that the Federal Tort Claims Act is the exclusive tort remedy against the government:

“The remedy against the United States provided by sections 1346(b) and 2672 of this title [Federal Tort Claims Act] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.”

Government employees acting within the scope of their employment are personally immune from liability for standard torts by reason of the Westfall Act. 28 U.S.C. §2679(d). Even if the U. S. Attorney certifies that an individual government employee named as a defendant was acting within the scope, that certification is subject to review by the Court. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434, 115 S.Ct. 2227,

2236 (1995); *Wilson v. Drake*, 87 F.3d 1073, 1075 (9<sup>th</sup> Cir. 1996). The burden is on the party challenging the certification, however, to prove by a preponderance of evidence (e.g., declarations or deposition testimony) that the employee was acting outside the scope of employment. *Gutierrez de Martinez v. Drug Enforcement Admin.*, 111 F.3d 1148, 1153 (4<sup>th</sup> Cir. 1997); *Palmer v. Flaggman*, 93 F.3d 196, 198-199 (5<sup>th</sup> Cir. 1996). If the U. S. Attorney refuses to certify that the defendant government employee was acting within the scope, that employee can challenge the determination in court at any time before trial. 28 U.S.C. §2679(d)(3).

Although the United States may be liable in tort under FTCA, it cannot be sued for injuries (including emotional injuries) by its employees due to the workers' compensation bar provided by FECA – 5 U.S.C. §8116(c). On the other hand, if USDOL denies the FECA claim, the tort action may lie because USDOL has exclusive jurisdiction to determine FECA coverage. The exceptions to government liability under FTCA (including the “discretionary function exception”) is beyond the scope of these materials.

The only proper defendant in a Title VII suit is the head of the Agency, and individual supervisors and co-employees will be dismissed. 42 U.S.C. §2000e-16(c). The only proper defendant in a Federal Tort Claims Act claim is the United States – 28 U.S.C. §2679(a) – though individual government employees may be sued individually under other laws as discussed above.

### **3. Coordination of tort lawsuits against third parties and workers' compensation (FECA)**

If a federal employee is injured on the job due to the fault of a non-federal entity or individual, the employee not only has the right but also the duty to pursue that tort claim. See generally, 20 C.F.R. §§ 10.705-10.719. 5 U.S.C. §8131 provides in relevant part:

“(a) If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability on a person other than the United States to pay damages, the Secretary of Labor may require the beneficiary to--

- (1) assign to the United States any right of action he may have to enforce the liability or any right he may have to share in money or other property received in satisfaction of that liability; or
- (2) prosecute the action in his own name.

An employee required to appear as a party or witness in the prosecution of such an action is in an active duty status while so engaged.

(b) A beneficiary who refuses to assign or prosecute an action in his own name when required by the Secretary is not entitled to compensation under this subchapter.

(c) The Secretary may prosecute or compromise a cause of action assigned to the United States. When the Secretary realizes on the cause of action, he shall deduct therefrom and place to the credit of the Employees' Compensation Fund the amount of compensation already paid to the beneficiary and the expense of realization or collection. Any surplus shall be paid to the beneficiary and credited on future payments of compensation payable for the same injury. However, the beneficiary is entitled to not less than one-fifth of the net amount of a settlement or recovery remaining after the expenses thereof have been deducted.”

Common situations in which such third-party claims arise include: auto accidents, slip-and-fall injuries due to negligence of contracted janitorial services, medical malpractice, toxic exposures such as asbestos (i.e. “products liability” cases), etc.

In practice, injured employees typically have no problem finding a personal injury attorney to represent them on a contingency fee contract, and the government has no need to prosecute such cases. Only one “federal” agency – the Postal Service – actively solicits its employees to assign their rights in the personal injury action back to the Agency. See FECA Procedure Manual 2-1100-12. This usually happens some months after the injury, if the Postal Service has not heard from an attorney representing the employee. If this does happen, the author is informed and believes that the employee does not receive full value for the tort claim, apparently because the Postal Service’s only interest is in recouping its costs, which include Continuation of Pay and amounts reimbursable to OWCP on the workers’ compensation claim.

Assuming the employee has hired an attorney to prosecute the personal injury action, the workers’ compensation law uses a reimbursement formula that always rewards the employee to some degree for prosecuting that case. 5 U.S.C. §8132 . This is true even if the workers’ compensation payout is several times the amount recovered in the third party case. Compare state workers’ compensation statutes, such as California’s, which can make the prosecution of a third-party case of no benefit to the employee where available insurance is less than the workers’ compensation lien.

Included as ***Attachment A*** is an OWCP form CA-162 showing the reimbursement formula used by OWCP. Line 8 allows the employee to keep 20% of the net recovery after attorney fees and costs, regardless of the amount OWCP paid or will pay on the claim. If there is a surplus of recovery shown on line 17, OWCP will take a credit and stop paying monetary benefits, medical bills, etc. until the credit is used up. Thereafter, OWCP will again begin paying on the claim.

The government’s right of reimbursement from third-party recoveries is statutory and automatic – the United States need not intervene in the employee’s tort lawsuit nor file a notice of lien. OWCP regulations make both the injured employee and his attorney personally responsible for satisfaction of OWCP’s interest in the third-party claim. FECA Procedure Manual 2-1100-11.

5 U.S.C. §8132 provides in relevant part that:

“No court, insurer, attorney, or other person shall pay or distribute to the beneficiary or his designee the proceeds of such suit or settlement without first satisfying or assuring satisfaction of the interest of the United States.”

Despite this rather dire language, in practice OWCP will not contest the reasonableness of a settlement or judgment, and only requires notice of the recovery within 30 days of receipt and deduction of its interest (as computed on form CA-162). FECA Procedure Manual 2-1100-7.

Where injuries to the employee result in a loss of consortium claim to the spouse, part of the third-party recovery can be attributed to the spouse, thus reducing the amount owed back to the government. FECA Procedure Manual 2-1100-9(b). Continuation of pay that the employee received from his employing agency does not figure into the amount reimbursable to the government. *Paul L. Dion*, 36 ECAB 656 (1985, petition for reconsideration denied 1985).

In the event the employee receives a third-party recovery and later reimburses OWCP for a period when s/he received workers’ compensation, s/he is considered never to have been in receipt of those workers’ compensation benefits, and thus is entitled to receive retirement benefits during that period of time. See FECA Program Memoranda Nos. 90, 277 included in these materials as **Attachment B**, and **topic 19**, below.

#### **4. Discrimination alleged in the Agency’s processing of a FECA claim with OWCP**

An employing agency’s actions in the processing of a workers’ compensation claim will generally not support a discrimination complaint, unless the agency delays or refuses to process the claim forms or other data. The Commission’s decisions hold that otherwise the EEO process could be used to mount a collateral attack on another agency’s proceedings, thus depriving EEOC of jurisdiction. See discussion in Robert S. Tucker v. United States Postal Service, EEOC Appeal No. 01A05003 (October 2, 2001):

“Complainant filed a timely appeal with this Commission from an agency’s decision dated March 20, 2000 dismissing his complaint of unlawful employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C.

§791 et seq. In his complaint, complainant alleged that he was subjected to discrimination on the basis of disability (back and neck injury) when:

“On August 8, 1999, the Department of Labor, Office of Workers' Compensation Programs (OWCP) and USPS conspired to reinstate complainant, for the sole purpose of terminating his OWCP benefits and inducing him to take straight disability;

“On December 3, 1999, an incomplete, unethical and tainted re-employment examination was administered to him;

“He was advised by an Injury Compensation Supervisor (ICS) before the results of his examination were known, that he would pass because the agency must take him back.

“The agency dismissed the claim pursuant to EEOC Regulations at 29 C.F.R. § 1614.105 (1) and § 1614.107(a)(2) for failure to comply with the applicable 45 day time limit, and pursuant to 29 C.F.R. § 1614.107(a) for failure to state a claim under 29 C.F.R. § 1614.103 or § 1614.106(a). Specifically, the agency determined that complainant's claim is within the exclusive jurisdiction of the Department of Labor, and is outside the purview of the EEOC regulations.

“Complainant alleges that the Commission has jurisdiction over this complaint because the agency decided to re-employ him despite knowing that he would not be able to function in a work environment due to his disability, that his disability was likely to deteriorate, and that it would create an economic hardship for him. He contends that this action constitutes a direct and personal deprivation at the hands of his employer, the agency.

“The Commission has held that a complainant states a claim where he or she alleges that, motivated by discriminatory animus, the agency took specific steps to interfere with a workers' compensation claim. *Bray v. United States Postal Service*, EEOC Appeal No. 01944243 (February 6, 1995), req. to reopen den., EEOC Request No. 05950410 (February 1, 1996); *Hogan v. Department of the Army*, EEOC Request No. 05940407 (September 29, 1994); *O'Neal v. United States Postal Service*, EEOC Request No. 05900620 (August 30, 1990). These cases typically involve failure of the agency to provide information or signatures necessary to process the workers' compensation claim. See *id.* Here, complainant alleges that the agency conspired with OWCP to force him to return to work despite having a medical condition that makes him unemployable.

“To address this aspect of his complaint, the Commission would have to review the determinations of OWCP which led to the determination that complainant's disability did not preclude his re-employment. Review of OWCP determinations is within the jurisdiction of the agency's Employees' Compensation Appeals Board, not the Commission, and does not fall within the limited circumstances under which a complainant may appeal to the Commission. See *Hogan*, EEOC Request No. 05940407 (September 29, 1994); *Gray v. Department of the Army*, EEOC Appeal No. 01944944 (August 8, 1995). Accordingly, we AFFIRM the agency's dismissal of complainant's claim.”

See also:

*Story v. USPS*, EEOC request No. 05960314 (10/18/96) - EEOC complainant may not use the EEO process to launch a collateral attack on the workers' compensation process.

*Hogan v. Dept. of Army*, EEOC request No. 05940407 (09/24/94) - Employing agency has the right to represent its position and interest in the OWCP forum, and the EEOC will not review decisions that would require it to judge the merits of the workers' compensation claim.

*Schultz v. Potter*, EEOC Appeal No. 01993177 (06/13/01):

“With respect to allegations #5, 6, 7, and 8, the Commission finds that these allegations have previously been raised and addressed in prior proceedings or they constitute a collateral attack on decisions rendered by OWCP or OPM. The Commission has held that an employee cannot use the EEO complaint process to lodge a collateral attack on another proceeding. See *Wills v. Department of Defense*, EEOC Request No. 05970596 (July 30, 1998); *Kleinman v. United States Postal Service*, EEOC Request No. 05940585 (September 22, 1994); *Lingad v. United States Postal Service*, EEOC Request No. 05930106 (June 25, 1993). The Commission also finds that with respect to allegations #5 and #6, complainant suffered no harm by the agency's efforts to obtain or use medical reports. Consequently, complainant was not an aggrieved employee with respect to these allegations and the agency acted properly when it dismissed them for failure to state a claim. See *Diaz v. Department of the Air Force*, EEOC Request No. 05931049 (April 21, 1994). Moreover, the regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. Accordingly, the agency's final decision dismissing complainant's complaint is AFFIRMED.”

Lau v. D'Amours, EEOC request No. 05950037 (1996), Bonham v. Potter, EEO PUB 2093 (2002) - Allegation of false statements made by employing agency to OWCP cannot support a valid EEOC complaint.

Downey v. Henderson, EEOC request No. 05990475 ( May 1, 2001):

“We have previously held that claims which challenge the proceeding or decision of another forum constitute a collateral attack and fail to state a claim under EEOC Regulations. See Fisher v. Department of Defense, EEOC Request No. 05930106 (July 15, 1994). The Commission has also held that it is within OWCP's jurisdiction to determine whether a compensation claim with OWCP has merit, and OWCP claims are not appealable to the EEOC. See Hogan v. Department of the Army, EEOC Request No. 05940407 (Sept. 29, 1994).”

But see Andel v. Postmaster General, EEOC No. 01975337 (1998) - It is retaliation for an agency to make disparaging remarks about an employee's EEO activity in responding to an OWCP claim. In such a case, a claim lies against both the employing agency and OWCP if the claim is denied. Accord: Mares v. Sec. of Army, EEOC No. 01960499 (1998)(employee alleged supervisor made disparaging remarks about his past EEO activity in his response to employee's OWCP claim).

There is a criminal statute that makes a supervisor's interference with a FECA claim a crime. See 18 U.S.C. §1922, which provides:

§ 1922. False or withheld report concerning Federal employees' compensation.

”Whoever, being an officer or employee of the United States charged with the responsibility for making the reports of the immediate superior specified by section 8120 of title 5, willfully fails, neglects, or refuses to make any of the reports, or knowingly files a false report, or induces, compels, or directs an injured employee to forego filing of any claim for compensation or other benefits provided under subchapter I of chapter 81 of title 5 [[5 USCS §§ 8101](#) et seq.] or any extension or application thereof, or willfully retains any notice, report, claim, or paper which is required to be filed under that subchapter [[5 USCS §§ 8101](#) et seq.] or any extension or application thereof, or regulations prescribed thereunder, shall be fined under this title or imprisoned not more than one year, or both.”

The workers' compensation statute provides in relevant part as follows:

5 U.S.C. §8120 Report of injury

“Immediately after an injury to an employee which results in his death or probable disability, his immediate superior shall report to the Secretary of Labor. The Secretary may--

- (1) prescribe the information that the report shall contain;
- (2) require the immediate superior to make supplemental reports;

and

- (3) obtain such additional reports and information from employees as are

agreed on by the Secretary and the head of the employing agency.

5 U.S.C. §8121 Claim

“Compensation under this subchapter may be allowed only if an individual or someone on his behalf makes claim therefor. The claim shall--

- (1) be made in writing within the time specified by section 8122 of this title;
- (2) be delivered to the office of the Secretary of Labor or to an individual whom the Secretary may designate by regulation, or deposited in the mail properly stamped and addressed to the Secretary or his designee;
- (3) be on a form approved by the Secretary;
- (4) contain all information required by the Secretary;
- (5) be sworn to by the individual entitled to compensation or someone on his behalf; and
- (6) except in case of death, be accompanied by a certificate of the physician of the employee stating the nature of the injury and the nature and probable extent of the disability.

The Secretary may waive paragraphs (3)--(6) of this section for reasonable cause shown.” U. S. Department of Labor regulations regarding such injuries state, in relevant part:

20 C.F.R. § 10.7 What forms are needed to process claims under the FECA?

“(a) Notice of injury, claims and certain specified reports shall be made on forms prescribed by OWCP. Employers shall not modify these forms or use substitute forms. Employers are expected to maintain an adequate supply of the basic forms needed for the proper recording and reporting of injuries. ...

(b) Copies of the forms listed in this paragraph are available for public inspection at the Office of Workers' Compensation Programs, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210. They may also be obtained from district offices, employers (i.e., safety and health offices, supervisors), and the Internet, at [www.dol.gov/dol/esa/owcp.htm](http://www.dol.gov/dol/esa/owcp.htm).”

20 C.F.R. §10.16 What criminal penalties may be imposed in connection with a claim under the FECA?

“(a) A number of statutory provisions make it a crime to file a false or fraudulent claim or statement with the Government in connection with a claim under the FECA, or to wrongfully impede a FECA claim. Included among these provisions are sections 287, 1001, 1920, and 1922 of title 18, United States Code. Enforcement of these and other criminal provisions that may apply to claims under the FECA are within the jurisdiction of the Department of Justice.”

20 C.F.R. § 10.101 How and when is a notice of occupational disease filed?

“(a) To claim benefits under the FECA, an employee who has a disease which he or she believes to be work-related must give notice of the condition in writing on Form CA-2, which may be obtained from the employer or from the Internet at [www.dol.gov/dol/esa/owcp.htm](http://www.dol.gov/dol/esa/owcp.htm). The employee must forward this notice to the employer. Another person, including the employer, may do so on the employee's behalf. The person

submitting a notice shall include the Social Security Number (SSN) of the injured employee. The claimant may withdraw his or her claim (but not the notice of occupational disease) by so requesting in writing to OWCP at any time before OWCP determines eligibility for benefits.”

20 C.F.R. § 10.110 What should the employer do when an employee files a notice of traumatic injury or occupational disease?

“(a) The employer shall complete the agency portion of Form CA-1 (for traumatic injury) or CA-2 (for occupational disease) no more than 10 working days after receipt of notice from the employee. The employer shall also complete the Receipt of Notice and give it to the employee, along with copies of both sides of Form CA-1 or Form CA-2.

(b) The employer must complete and transmit the form to OWCP within 10 working days after receipt of notice from the employee if the injury or disease will likely result in:

- (1) A medical charge against OWCP;
- (2) Disability for work beyond the day or shift of injury;
- (3) The need for more than two appointments for medical examination and/or treatment on separate days, leading to time loss from work;
- (4) Future disability;
- (5) Permanent impairment; or
- (6) Continuation of pay pursuant to 5 U.S.C. 8118.

(c) The employer should not wait for submittal of supporting evidence before sending the form to OWCP.”

20 C.F.R. §10.116 What additional evidence is needed in cases based on occupational disease?

“(a) The employee must submit the specific detailed information described on Form CA-2 and on any checklist (Form CA-35, A-H) provided by the employer. OWCP has developed these checklists to address particular occupational diseases. The medical report should also include the information specified on the checklist for the particular disease claimed.

(b) The employer should submit the specific detailed information described on Form CA-2 and on any checklist pertaining to the claimed disease.”

20 C.F.R. § 10.117 What happens if, in any claim, the employer contests any of the facts as stated by the claimant?

“(a) An employer who has reason to disagree with any aspect of the claimant's report shall submit a statement to OWCP that specifically describes the factual allegation or argument with which it disagrees and provide evidence or argument to support its position. The employer may include supporting documents such as witness statements, medical reports or records, or any other relevant information.

(b) Any such statement shall be submitted to OWCP with the notice of traumatic injury or death, or within 30 calendar days from the date notice of occupational disease or death is received from the claimant. If the employer does not submit a written explanation to support the disagreement, OWCP may accept the claimant's report of injury as established. The employer may not use a disagreement with an aspect of

the claimant's report to delay forwarding the claim to OWCP or to compel or induce the claimant to change or withdraw the claim.”

In practice, criminal prosecutions for interfering with FECA claims are so rare as to be nearly non-existent. The author has only heard of two such prosecutions ever brought. FECA itself has no anti-retaliation provisions. By contrast, in California there is a section of the state Labor Code that allows an injured worker to file a claim against the employer for retaliation for filing a workers' compensation claim, and if a termination occurs soon after the claim filing it is presumed to be retaliatory. FECA has no such remedy. One remedy available is to file EEO complaints for hostile work environment and failure to accommodate.

Interference with the right of a federal civilian employee to file a workers' compensation claim may give rise to a *Bivens* claim for violation of due process rights guaranteed by the Constitution, regardless of whether FECA benefits were later granted or denied. *Grichenko v. U. S. Postal Service*, 524 F. Supp. 672, 677 (E.D.N.Y 1981).

## **5. Coordination of EEO pecuniary damage awards and FECA benefits**

Where there is a potential for overlap between a FECA claim and an EEO complaint, double recovery must be avoided. *Baker v. Runyon*, 922 F.Supp. 1300 (N.D. Ill. 1996). There is no potential for overlap regarding compensatory damages for emotional distress, but to the extent FECA provides wage loss compensation and Title VII provide a remedy of back pay, there is a potential for overlap. But FECA is not an exclusive remedy for the emotional harm caused by illegal discrimination. *Finlay v. Postmaster General*, EEOC No. 01942985 (1997).

Another area of potential overlap is damages for medical expenses. For example, in making an award for future pecuniary damages, allowance must be made for the continuation of FECA medical benefits, and the agency is entitled to deduct such benefits from the future pecuniary damage award. *Cook v. Postmaster General*, EEOC No. 01950027 (1998).

“Under the Federal Employees Compensation Act (FECA), compensation from the Office of Workers' Compensation Programs (OWCP) is deductible from back pay if it is in the form of a wage-replacement benefit. This is to avoid double wage recovery.” EEOC website, and see *Nichols v. Frank*, 42 F.3d 503, 516 (9<sup>th</sup> Cir. 1994).

However, the portion of the OWCP award that is paid as reparation for physical injuries [i.e., “scheduled awards”] is not subject to deduction because such compensation is not related to wages earned. See *Sands v. Department of Defense*, EEOC Petition No. 04990001 (February 25, 2000). OWCP awards for physical injuries in this context are referred to as “scheduled awards”, and are paid for certain injuries resulting in permanent impairment to particular body parts. EEOC website, and see 5 U.S.C. §8107.

See also, for cases holding that the workers' comp bar does not preempt ADA claims generally: Wood v. Alameda, 875 F Supp 659, 665 (ND Cal 1995)(ADA); Smith v. Lake City Nursing Home, 771 F Supp 985, 986-987 (D Minn. 1991)(Rehabilitation Act); and EEOC Enforcement Guidance: Workers' Compensation and the ADA (9/3/96), Question 30, and cases cited, online at <http://www.eeoc.gov/docs/workcomp.html>.

For similar reasons, many states do not apply the "comp bar" to claims under their state antidiscrimination statutes. See, e.g., Davis v. Dillmeier Enterprises, Inc., 956 SW2d 155 (Ark. 1997); Moorpark v. Superior Court, 18 Cal 4th 1143, 77 Cal Rptr 2d 445, 959 P2d 752 (1998); Konstantopoulos v. Westvaco Corp., 690 A2d 936 (Del 1996); Hardaway Management Co. v. Southerland, 977 SW2d 910, 917 (Ky 1998); King v. Bangor Federal Credit Union, 568 A2d 507, 508-509 (Me. 1989); Byers v. Labor & Industry Review Commission, 561 NW2d 678 (Wis. 1997).

If the employee was disabled during a period of time for which a claim for back pay is made, s/he cannot obtain back pay for that period – assuming that the inability to work would also have existed even if the employer had reasonably accommodated the employee. Absent reasonable accommodation, back pay is still recoverable for such a period. See discussion in Morris v. Roche, 182 F.Supp.2d 1260, 1278-1280 (M.D.Ga. 2002):

*“C. Is Plaintiff Entitled to Recover Back Pay for the Time Period During Which He Was Unable or Unwilling to Work?”*

In resolving this issue, the Court is guided by the following principle: ‘Generally, a Title VII plaintiff can recover back pay only for the period the plaintiff is “available and willing to accept substantially equivalent employment” elsewhere; courts exclude periods where a plaintiff is unavailable to work, such as periods of disability, from the back pay award.’ Lathem v. Department of Children & Youth Servs., 172 F.3d 786, 794 (11th Cir. 1999) (quoting Miller v. Marsh, 766 F.2d 490, 492 (11th Cir. 1985)).

The Court agrees that Defendant would be entitled to summary judgment on this issue if Plaintiff had admitted that he was unable to perform the essential functions of his job, with or without a reasonable accommodation, [FN16] but Plaintiff has made no such admission. In fact, Plaintiff vigorously disputes Defendant's assertion that he was not able to perform the essential functions of his job, with or without a reasonable accommodation. In this regard, the Court notes that Plaintiff cannot be considered unable or unwilling to work simply because he was fired. Throughout this litigation, Plaintiff has maintained that he was ready, willing, and available to work between March 1995 and February 28, 2000, a position reinforced by his reinstatement on February 28, 2000. There is no evidence suggesting that Plaintiff was at one time unable or

unwilling to work because of his disability, but that his condition improved to the point that he was ready, willing, and able to work by February 28, 2000. Indeed, the evidence indicates that Plaintiff's condition was the same in March 1995 as it was on February 28, 2000. Moreover, the parties dispute what the essential functions of Plaintiff's job were, especially whether they included mobility. Because these disputes involve genuine issues of material facts, *see infra* Part III.E, summary judgment on this issue is inappropriate. *See Cramer v. Florida*, 885 F.Supp. 1545, 1550 (M.D.Fla. 1995)(recognizing that 'the determination of the ability to perform essential functions is generally a factual question'), *aff'd*, 117 F.3d 1258 (11th Cir. 1997)."

## **6. Coordination of EEO pecuniary damages and disability retirement benefits.**

At least in civil rights cases, disability retirement benefits should not be deducted from a back-pay award. *See Arneson v. Callahan*, 128 F.3d 1243, 1247-48 (8th Cir. 1997) (exploring the "collateral source" rule).

Practitioners should be aware that OPM may not implement terms of an EEOC settlement agreement that impinges on its (OPM's) jurisdiction. *See Freeman v. Department of the Army*, EEOC Request No. 05990031 (July 13, 2001). Complainant, a GS-12 employee raised a claim of hostile work environment, under Title VII and the Rehabilitation Act. The parties entered into a settlement agreement which provided for the agency to recalculate complainant's disability retirement at the GS-14, step 10 level. However, subsequent to the execution of the agreement, the Office of Personnel Management (OPM), as administrator of the Civil Service Retirement System (CSRS), advised the agency that it would not implement the provision because, *inter alia*, it appeared that the agreement had been drafted solely to provide complainant with an annuity in excess of that to which he was entitled. Complainant claimed breach of the agreement. The Commission found the provision to be unenforceable. It noted that the monetary relief available for hostile environment harassment under Title VII and the Rehabilitation Act was an award of compensatory damages, instead of a promotion for which complainant never claimed he had applied or been denied. The Commission urged the parties to renegotiate the agreement, ratify it in the absence of the provision at issue, or continue with the processing of complainant's underlying complaints

## **7. Early retirement offer is not age discrimination**

*Johnson v. Runyon*, 137 F.3d 1081 (8th Cir., 1998).

Plaintiff was 52 years of age and a tour superintendent at the agency when the agency embarked on a major reorganization. All tour superintendent positions were abolished, but a higher-level position requiring additional

skills was created. Plaintiff along with others was offered early retirement. An agency official later informed him that he did not intend to hire him for one of the new higher-level positions, on the grounds that he lacked the required skills. The official testified that he informed plaintiff because plaintiff had to make his early retirement decision. The official also testified that he told plaintiff that he would still have a job with the agency, and would not be reduced in pay.

Plaintiff accepted the early retirement offer, but testified that he had not intended to retire early. He filed suit, alleging age discrimination, after the agency selected persons for the higher-level position who ranged in age from 36 to 48. The district court entered judgment in favor of the agency. The district court found that plaintiff failed to make a prima facie showing; because he retired voluntarily, he did not suffer an adverse employment action.

The circuit court agreed. The court stated that where there was no adverse employment action, plaintiff could recover only if he could show that he was constructively discharged. The court noted that plaintiff chose to retire rather than to wait and see what positions would be available after the reorganization. No reasonable person would have found these working conditions so intolerable that they would force an employee to quit, ruled the circuit court.

## **8. OWCP “factual” determinations are not binding on other agencies or courts**

See *NALC v. USPS*, 272 F.3d 182, 187 (2001):

“While we have not addressed the issue, the Court of Appeals for the Federal Circuit and a district court have adopted the Postal Service's interpretation that [5 USC] section 8128(b) [the section of FECA that precludes judicial review of USDOL decisions] only precludes subsequent courts and tribunals from challenging or contradicting OWCP's factual or legal determinations with respect to granting or denying payments under FECA. See *Minor v. Merit Sys. Prot. Bd.*, 819 F.2d 280 (Fed. Cir. 1987); *United States v. Carpentieri*, 23 F. Supp. 2d 433 (S.D.N.Y. 1988). Both of these courts held that in proceedings following OWCP determinations courts are bound only by the "Labor Department's decisions on the making or denying of compensation awards," and are not bound by the OWCP's factual conclusions. *Minor*, 819 F.2d at 283; see *Carpentieri*, 23 F. Supp. 2d at 438.”

To similar effect, see *U. S. v. Sforza*, 326 F.3d 107 (2002):

“The jurisdictional bar in § 8128(b) seems to have been designed chiefly to ensure ‘[1] that the courts not be burdened by a flood of small claims challenging the merits of

compensation decisions and [2] that the Secretary should be left free to make the policy choices associated with disability decisions.’ [Rodrigues v. Donovan](#), 769 F.2d 1344, 1347-48 (9th Cir. 1985) (citations omitted) (holding that § 8128(b) did not preclude litigation of constitutional due process challenge to procedures used by OWCP in denying [\*115] benefits). Neither goal is disserved by allowing the government to pursue fraudulent claim-seekers under the FCA (at least so long as OWCP’s decision awarding or denying benefits on the basis of the record before it is respected). See [United States v. Carpentieri \("Carpentieri I"\)](#), 23 F. Supp. 2d 433, 438 (S.D.N.Y. 1998) (holding that § 8128(b) does not bar suit under the FCA because the government’s FCA suit would not ‘entail a re-litigation of issues already presented to and resolved by the OWCP’). Our reading of § 8128(b) is consistent with decisions of other courts in analogous cases. Thus the Federal Circuit held in [Minor v. Merit Systems Protection Board](#), 819 F.2d 280 (Fed. Cir. 1987), that § 8128(b) does not bar an action seeking the termination of a civil service employee based upon allegations of FECA fraud, notwithstanding a prior determination by OWCP that the employee was entitled to full benefits. See [id.](#) at 283. The court relied on the different remedies at issue in the OWCP action and the civil service proceeding: ‘even though much the same facts and evidence may have been before the [arbitrator deciding whether the FECA beneficiary could be terminated,] and also before the [OWCP deciding whether benefits were warranted], it was the [arbitrator] that had power to decide [the employee’s] fraudulent acts and to remove her on that ground.’ n4 *Id.* The Third Circuit, facing a similar issue, likewise rejected the claim that § 8128(b) precluded re-litigation of all issues decided by OWCP. See [Nat’l Ass’n of Letter Carriers, AFL-CIO, v. United States Postal Serv.](#), 272 F.3d 182, 188-89 (3d Cir. 2001) (holding that arbitrator of employee’s wrongful termination claim was not bound by factual determinations made by OWCP in granting employee FECA benefits). n5

n4 The Merit Systems Protection Board, which reviews the decisions of arbitrators such as those at issue in *Minor*, has similarly read § 8128(b) to preclude relitigation of OWCP’s decisions concerning the award or denial of FECA benefits but to not preclude judicial review of collateral issues such as whether an employee has defrauded the government. See [Miller v. U.S. Postal Serv.](#), 26 MSPR 210, 213 (1985); see also [Smith v. U.S. Postal Serv.](#), 81 MSPR 92, 98 (1999); [Daniels v. U.S. Postal Serv.](#), 57 MSPR 272, 279 (1993).

n5 In reaching its conclusion regarding the scope of § 8128(b), the Third Circuit relied in part on the fact that OWCP proceedings are non-adversarial: It would be strange if a determination in a non adversarial proceeding had a preclusive effect in an adversarial proceeding as "the general rule [is] that issue preclusion attaches only 'when an issue of fact or law is actually litigated and determined by a valid and final judgment . . . .'" [Arizona v. California](#), 530 U.S. 392, 414, 147 L. Ed. 2d 374, 120 S. Ct. 2304[] (2000). While we do not suggest that Congress could not make a ruling under section 8128(b) preclusive in the circumstances here, we hold that it did not do so. [Nat’l Ass’n of Letter Carriers](#), 272 F.3d at 189.”

See also: *New v. Department of Veterans Affairs*, 142 F.3d 1259, 1264 (Fed. Cir. 1998), holding that OWCP decisions do not bind agencies or the Board acting within their own statutory sphere of authority.

Compare: Agencies tend to give deference to OWCP determinations as to the suitability of a job offered as an accommodation. “[I]t is well settled that where OWCP has made a decision on the suitability of an offered position, such decisions are within the exclusive domain of OWCP, and it is that agency, and not the Board, which possesses the requisite expertise to evaluate whether a position is suitable in light of an employee’s particular medical condition [citing *New v. Department of Veterans Affairs*, *supra*].” *Ballesteros v. USPS*, Docket No. CH-0353-00-0517-I-1 (issued May 16, 2001). And see **topic 19b**, below.

## 9. Reassignment as reasonable accommodation

“In 1992, Congress amended the Rehabilitation Act of 1973, incorporating the employment provisions of the Americans with Disabilities Act of 1990 (ADA) into the Rehabilitation Act, in order to promote consistent application of the two laws.<sup>(1)</sup> The EEOC has now published a final rule clarifying the application of the employment provisions of the ADA to federal government workers.<sup>(2)</sup> The rule incorporates by reference the EEOC's ADA regulations, found at 29 C.F.R. Part 1630, into the federal sector EEO complaint processing regulations, found at 29 C.F.R. Part 1614.

Among the most significant changes resulting from this final rule is the deletion of the regulatory limits on reassignment of federal employees with disabilities as a reasonable accommodation, formerly found at 29 C.F.R. Section 1614.203(g). For example, under the prior regulation, reassignment was not an available accommodation for a probationary employee. Under the revised regulations reassignment is a possible accommodation so long as the employee adequately performed the essential functions of the position, with or without accommodation, before the need for reassignment arose, regardless of the probationary status of the employee. The Commission points out in the preamble to the new rule, however, that if a probationary employee has never adequately performed the essential functions of the position, s/he is not entitled to reassignment because s/he was never "qualified" for the original position.”

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**10. Status as “Person with a disability” for disability discrimination purposes is not determined by limited duty assignment, receipt of OWCP award, or application for disability retirement.**

*Waller v. Dept. of Defense*, EEOC Decision No. 05940919 (04/16/95); *Bailey v. U. S. Postal Service*, EEOC Decision No. 01952545 (03/07/96). See also EEOC Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person is a “Qualified Individual with a Disability” Under the Americans With Disabilities Act of 1990 (ADA), February 12, 1997; *Murphey v. City of Minneapolis*, 358 F.3d 1074 (8<sup>th</sup> Cir. 2004)(ADA claim and state public employees’ disability retirement application).

**11. Alleged discrimination as basis for workers’ compensation claim**

When a complaint of discrimination is filed in a workers’ compensation claim, “the issue generally speaking is not whether in fact there was harassment, or discrimination, but whether the disabling emotional reaction was ‘precipitated or aggravated by the conditions of the employment.’” *Leonard Dureseau, Jr.*, 39 ECAB 1062 (1988). Employment disputes in the form of administrative or personnel matters, not directly involving the employee’s day-to-day work duties, however, are excluded from FECA coverage unless the employee can show the Agency acted “erroneously or abusively” in connection with the dispute. *Thomas D. McEuen*, 41 ECAB 387 (1990), reaff’d on recon., 42 ECAB 566 (1991).

One type of erroneous action is illegal discrimination. See, for example, *Donna J. DiBernardo*, 47 ECAB 700 (1996), holding sexual harassment is compensable if shown to have occurred (in absence of any EEOC determination).

“Appellant also alleged that harassment and discrimination on the part of her supervisors and coworkers contributed to her claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors. However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act. In the present case, appellant submitted affidavits in which a supervisor and several coworkers supported her claim that she was subjected to harassment in the form of **sexist jokes and comments, touching of a sexual nature and verbal sexual advances, including** instances, beginning in 1985, when a coworker harassed her by **calling her unlisted home telephone number**. Thus, appellant has submitted sufficient evidence to establish a compensable employment factor under the Act with respect to her exposure to this harassment in the workplace.” [emphasis added]

Compensable work-related stress may be found regardless of whether discrimination is ever proven. For example, in *Martha L. Cook*, 47 ECAB 226 (1995), the claimant alleged harassment by the Postmaster. When the EEOC issued its opinion that no finding of discrimination was found, the Office [OWCP] rescinded its previous acceptance of claimant's psychiatric condition, citing the EEOC decision as its reasoning for doing so. In reversing on appeal the Office's decision to rescind acceptance, the Board stated that, "[w]hile the Office may look to evidence from an EEOC claim in making a determination as to whether incidents of harassment have occurred as alleged, the Office must make its own independent finding." (emphasis added).

The Board followed this ruling in *Steven E. Heath*, 2003 WL 22076723, Docket No. 02-1028 (ECAB) issued July 13, 2003:

**“Where, as in this case, an employee alleges harassment and cites to specific incidents or working conditions and the employer denies that harassment occurred, the Office, as part of its adjudicatory function must make findings of fact regarding whether the alleged factors are factually established and constitute compensable factors of employment. The issue in such cases is not whether the claimant has established harassment or discrimination under standards applied by the EEOC.** Rather, under the Act, the issue is whether the claimant has submitted evidence sufficient to establish an injury in the performance of duty. The standards for harassment or discrimination as defined by the EEOC do not represent the standard for claim adjudication under the Act, where the term harassment is synonymous, as generally defined, with a persistent disturbance, torment or persecution, i.e., mistreatment by coemployees or supervisors. [FN20] **While the Office may look to evidence from an EEOC claim in determining whether incidents of harassment occurred as alleged, the Office must make its own independent findings.** The standard for ‘harassment’ or ‘discrimination’ as defined by EEOC statutory or case law is not the applicable standard for a claim under the Act. [emphasis added]”.

Conversely, if EEOC has found, on a detailed record, that illegal discrimination has occurred, OWCP will normally accept that finding as establishing erroneous action by the employer, and grant workers' compensation benefits – in effect deferring to EEOC on issues within the latter's expertise. See *Thomas L. Lineberg*, ECAB Docket No. 03-1443, 2003 WL 22481660 (E.C.A.B.)(2003)(EEOC finding of race-based harassment). Cf: *Brian T. Porter*, ECAB Docket No. 03-2072, 2003 WL 23170587 (E.C.A.B.)(2003)(EEOC order not ruling on the merits is insufficient to establish that the employing establishment committed error or abuse).

And see cases discussed under **topic 15**, below.

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## 12. Unique aspects of workers' compensation system that favor the employee

Once OWCP grants disability benefits to an injured employee, the benefits cannot be reduced or terminated without due process of law. "... [D]ue process and elementary fairness require that the Office observe certain procedures before terminating a claimant's monetary benefits." *Charlene R. Herrera*, 44 ECAB 361 (1993); "The Supreme Court has held that the essential requirements of due process are 'notice and an opportunity to respond'." *Mary A. Howard*, 45 ECAB 646 (1994) (applying this principle to terminations of benefits for abandonment or refusal of suitable work under 5 USC §8106(c)). See *Attachment C* for an example of a successful opposition to a proposed benefit cutoff.

Proceedings under the FECA are not adversarial in nature. 20 CFR §10.0. While the claimant has the burden of establishing entitlement to compensation, the Office shares responsibility in the development of the evidence. *Dorothy L. Sidwell*, 36 ECAB 699 (1985). Proceedings under the FECA are not adversarial in nature, unlike proceedings before state workers' compensation tribunals. The Office has dual role: (1) investigator of facts and protector of the Compensation Fund, and (2) quasi-judicial function of deciding the rights of claimant. *Joel C. Webb*, 4 ECAB 79 (1950).

"Workers' compensation statutes are remedial legislation and should be liberally construed in favor of the employee." *Pearl Phillips Parker (George Tom Parker)*, 9 ECAB 200 (1956). For example, see *Peggy Ann Avila*, 45 ECAB 812 (1994), in which Claimant missed her FECA hearing, stating she could not find Room 9100 in the federal building. The Office denied her request for a new hearing date, saying any reasonable person would have made inquiries and found it. The Board held that claimant made a sufficient showing that she deserved a new hearing date, citing its case law about the remedial nature of the statute.

A grant of benefits to the employee cannot be appealed by the employer. *John J. O'Rourke*, 38 ECAB 324 (1986).

Compensation benefits are exempt from the claims of creditors, and cannot be assigned to someone else. 5 U.S.C. §8130. This does not prevent division of such benefits in state family law proceedings where appropriate, however. See, e.g., *In re Marriage of Geigle*, 920 P.2d 251 (Wash. 1996).

Once the work-connected character of any injury has been established, the subsequent progression of that condition remains compensable. *Charlet Garrett Smith*, 47 ECAB 562 (1996) (recurrence of PTSD accepted – employee attended a training session in which teacher mentioned her prior incident 4 years earlier in which two other employees died, and she experienced an exacerbation of her PTSD, with sleep disturbance, nightmares, anxiety and depression).

Any contribution – no matter how slight – by the employment to the production of the injury or disease is sufficient to make the entire disability compensable, without apportionment. *Beth P. Chaput*, 37 ECAB 158 (1985).

If the employee suffers a “traumatic injury” (something that occurs over a period no longer than one work day or one work shift), the employee’s regular pay is continued by the employing agency for 45 calendar days. 5 U.S.C. §8118.

The FECA benefit for total temporary disability is 66-2/3% of regular pay, or 75% for employees who are married and/or have a dependent. 5 U.S.C. §§8105, 8110. All FECA benefits are tax-free. 26 U.S.C. §104(a)(1). There is no “cap” on the amount of benefits per claim or the length of time benefits can be received.

Regarding accommodation, for workers’ compensation purposes OWCP cannot place the burden on the employee to ask his/her doctor for, and receive from the doctor, medical work restrictions – since [former] 20 CFR §10.124(b) says the employer must make a written offer of employment to employee. *Charlene R. Herrera*, 44 ECAB 361 (1993). Now see 20 CFR §10.507.

The ECAB in *Maggie L. Moore*, 43 ECAB 819, 823 (1992)(Maggie Moore III) held that an employee has a property interest in not having his or her benefits terminated and “In addition, a claimant who has sustained an employment related injury has a vested interest in not being coerced into accepting a job that may aggravate his or her condition or cause re-injury.” A similar holding was issued in *Sandra J. Corson*, ECAB Docket No. 95-1933 (07/02/98).

Any waiver of FECA workers’ compensation rights is invalid. See 20 CFR §10.15: “May compensation rights be waived? No employer or other person may require an employee or other claimant to enter into any agreement, either before or after an injury or death, to waive his or her right to claim compensation under the FECA. No waiver of compensation rights shall be valid.”

The disadvantages inherent in the FECA system include:

- no right to judicial review, except in rare instances of constitutional rights violations. 5 U.S.C. §8128(b); *Duncan v. Department of Labor*, 49 Fed. Appx. 653 (8<sup>th</sup> Cir. 2002); *Rodrigues v. Donovan*, 769 F.2d 1344 (9<sup>th</sup> Cir. 1985); *Czerkies v. USDOL*, 73 F.3d 1435, 1439 (7<sup>th</sup> Cir. 1996).
- inconsistent application of the law and interpretation of the facts by OWCP.

### **13. Unique aspects of disability retirement system that favor the employee**

Disability under the Federal Employees’ Retirement Act (FERS) is defined in 5 C.F.R. §844.102 as: “Disabled and disability means unable or inability, because of

disease or injury, to render useful and efficient service in the employee's current position ... ." ; and in 5 U.S.C. §8451(a)(1)(B) as: "... [A]n employee shall be considered disabled only if the employee is found by the Office [of Personnel Management] to be unable, because of disease or injury, to render useful and efficient service in the employee's position."

Disability under the "old" Civil Service Retirement System (CSRS) is similarly defined in 5 CFR §831.1202 as "Disabled and disability mean unable or inability, because of disease or injury, to render useful and efficient service in the employee's current position, or in a vacant position in the same agency at the same grade or pay level for which the individual is qualified for reassignment. ... Medical condition means a health impairment resulting from a disease or injury, including a psychiatric disease. ... Useful and efficient service means (1) acceptable performance of the critical or essential elements of the position; and (2) satisfactory conduct and attendance."; and in 5 USC §8337(a) as: "Any employee shall be considered to be disabled only if the employee is found by the Office of Personnel Management to be unable, because of disease or injury, to render useful and efficient service in the employee's position and is not qualified for reassignment, under procedures prescribed by the Office, to a vacant position which is in the agency at the same grade or level and in which the employee would be able to render useful and efficient service."

In other words, the employee must only show disability from his or her current or last federal position, as opposed to disability from performing any other work. See a successful MSPB closing argument (*Attachment D*) and the resulting AJ decision (*Attachment E*) included with these materials for a discussion of some of these issues.

An employee can file an application for disability retirement while still employed, or up to one year after his or her federal employment has ceased. 5 U.S.C. §8337(b), 5 CFR §831.1204(a). The disability itself, however, must have arisen during the period of federal employment. The time limit for filing a disability retirement application can be waived where evidence established the employee was mentally incompetent following her removal and did not subsequently regain her mental competence for a total of a year before she filed her application. *Willis v. OPM*, 50 MSPR 584 (1991); *Hass v. OPM*, 84 MSPR 110 (1999).

The employee bears the burden of proof to show eligibility for disability retirement. *Chavez v. OPM*, 6 MSPR 404 (1981). There is no requirement in disability retirement cases that the applicant prove "total disability". *Oglesby v. OPM*, 19 MSPR 112 (1984); *Whitmer v. OPM*, 41 MSPR 658 (1989); *Kardatzke v. OPM*, 92 MSPR 74, ¶5 (2002). Even if an employee, by dint of special effort, is able to continue working after an injury, this fact does not prove s/he is not disabled for retirement purposes. For example, in *Meighen v. OPM*, 7 MSPR 1264, 167 (1981) the Board found that the ability to perform during 45% of the normal work period does not constitute the performance of useful and efficient service (appellant's fainting spells were sudden, unpredictable, posed the threat of injury to herself and her coworkers, and interfered substantially with her

work). And see *McGhee v. OPM*, 20 MSPR 372, 374 (1984)(appellant was disabled due to irregular performance of job tasks); *Crittendon v. OPM*, 26 MSPR 152 (1985)(urinary incontinence requiring frequent breaks rendered the appellant disabled for retirement purposes).

Once disability retirement benefits are granted by OPM, the employee remains a pensioner for life, except if either (1) the employee fully recovers to the extent that s/he can return to the full-time, full-duty work of their last federal job, or (2) the employee earns more than 80% of the current payrate of his/her last federal job in any given calendar year. 5 U.S.C. §5343(f); 5 CFR §532.401. In the event of full recovery, the employee's pension benefits stop until s/he reaches regular retirement age, then they resume. In the event of earnings more than the 80% limit, the employee may reapply for disability retirement benefits if the ability to earn that amount decreases again because of the disability. *Rodriguez v OPM*, 57 MSPR 611 (1993)(Applicant is not entitled to reinstatement of disability annuity in absence of showing that disability on which annuity was based, and not some other disability, has recurred).

To defeat an application for disability retirement, any accommodation offered by the Agency must be a "full accommodation". To be fully accommodated, the duties offered must comprise a duly constituted "vacant position" within the meaning of 5 CFR §§844.102, 844.103. See *Noyer v. OPM*, 44 MSPR 336 (1990); *Breyer v. OPM*, 53 MSPR 628 (1992); *Eshelman v. OPM*, 72 MSPR 173 (1996); *Gometz v. OPM*, 69 MSPR 115, 122 (1995); *Bracey v. OPM*, 236 F.3d 1356 (Fed. Cir. 2001); *Marino v. OPM*, 243 F.3d 1375 (Fed. Cir. 2001). The principles of *Bracey* and *Marino* apply to the Postal Service, even though Postal employees are not subject to Title V in all respects. *Brickers v. OPM*, Docket No. DC-844E-00-0348-I-1 (06/26/01); *Ancheta v. OPM*, MSPB Docket No. SF-844E-01-0309-B-2, slip op., ¶ 12 (Dec. 22, 2003 – *Ancheta #2*); *Bell v. OPM*, MSPB Docket No. CH-844E-02-0627-I-1 (issued Jan. 14, 2004); *Starks v. OPM*, MSPB Docket No. CH-844E-01-0643-I-1 (issued Jan. 5, 2004). An offer of work at a temporary limited/light-duty assignment does not bar an employee from disability retirement, even if he/she rejects the position. *Brickers v. OPM*, MSPB Docket No. DC-844E-00-0348-I-1 (June 26, 2001). In *Brickers*, the Board quoted the *Marino* holding as follows:

"As we stated in *Bracey*, "[a] 'position' in the federal employment system is required to be classified and graded in accordance with the duties, responsibilities, and qualification requirements associated with it." 236 F.3d at 1359. Therefore, any evaluation of useful and efficient service for disability purposes must be with respect to the employee's official position, not an unofficial light duty assignment."

The employee does not bear the burden of proving that the employing agency could not accommodate her under FERS. See *Craig v. OPM*, MSPB Docket No. CH-844E-01-0084-I-1 (09/24/02).

If the disability is work-related, and the employer accommodates the employee (perhaps under pressure from OWCP to offer suitable alternative employment) after OPM grants the disability retirement application, this accommodation comes too late to affect the employee's right to OPM benefits. The employee may be forced to forfeit any future workers' compensation monetary benefits (other than medical treatment costs), however, if s/he refuses the accommodation, per 5 U.S.C. §8106(c) and 20 CFR §10.517.

**14. Workers' compensation bar does not preclude discrimination complaints against the government.**

*Sullivan v. U.S.*, 428 F.Supp. 79 (E.D. Wis. 1977)(FECA does not preclude complaints arising under anti-discrimination laws generally); *Dubee V. Henderson*, 56 F. Supp. 2d 430 (D. Vt. 1999)(Postal employee was sexually harassed by a coworker. She began receiving OWCP benefits for the stress, then sued for sex harassment under Title VII and disability discrimination under the Rehab Act. US argued that FECA was the exclusive remedy. Court held discrimination falls outside the parameters of workers' compensation); *Nichols v. Frank*, 42 F.3d 503 (9<sup>th</sup> Cir. 1994)(FECA does not preclude Rehabilitation Act complaints - the harm suffered by a victim of disability discrimination is not an injury within the meaning of FECA).

**15. Alleged harassment or "stress" as basis for workers' compensation claim**

*Leonard Dureseau, Jr.*, 39 ECAB 1062 (1988)(appellant's feeling of being harassed and/or discriminated against at work was work-related because (1) where the disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability is within FECA coverage; (2) where employee has alleged that the employment situation which caused his emotional reaction included actions taken by his superiors which the employee described as constituting harassment, the issue generally speaking is not whether in fact there was harassment, or discrimination, but whether the disabling emotional reaction was 'precipitated or aggravated by the conditions of the employment'.

"Abusive" actions by the employer can give rise to a valid FECA claim. *Thomas B. McEuen*, 41 ECAB 387 (1990), reaff'd on recon., 42 ECAB 566 (1991). The term "abusive" is nowhere defined, and is decided on a case-by-case basis based on whether the Board feels the agency acted "unreasonably" *Troy R. Washum*, 44 ECAB 629 (1993).

The following are examples of fact situations that have given rise to workers' compensation emotional stress claims that were approved:

- Verbal abuse. *Ann L. Norris*, ECAB Docket No. 90-165 (07/08/91); *Neil F. Carney*, 36 ECAB 289 (1984); *Rita L. Power*, 35 ECAB 403 (1983).

- Letters of warning. *David F. Cianciolo*, 45 ECAB 731 (1994).
- Difficult relations with supervisors, when sufficiently detailed and supported by evidence. *Samuel F. Manguin, Jr.*, 42 ECAB 671 (1991).
- A shift change (i.e. from day to night work). *Dodge Osborne*, 44 ECAB 849 (1993)(but refusal to attempt to perform new duties means he can't claim the new duties were a compensable factor); *Charles Jenkins*, 40 ECAB 362 (1988).
- Error or abuse in a personnel matter (performance evaluation and failure to give step increase). *Janet I. Jones*, 47 ECAB 385 (1996)(MSPB decision showing error by agency was not credited by hearing officer – the case was remanded for further development by the Board); *Thomas B. McEuen*, 41 ECAB 387 (1990), reaff'd on recon., 42 ECAB 566 (1991)(administrative and personnel matters generally).
- Heart attack and death due to personnel action that was later reversed, resulting in an award of widow's benefits. *Mary Alice Cannon*, 32 ECAB 1235 (1981).
- Emotional upset at a change in policy that would not otherwise be a compensable factor of employment under FECA, if the policy change increased the difficulty of the job. *Donald E. Ewals*, ECAB Docket No. 94-2604 (1997).
- A USPS supervisor's mishandling of a situation at work can give rise to a claim. (altercation between claimant and a Postal Inspector, after supervisor told claimant the PM wanted to see him in his office, but when he got there it was a Postal Inspector who started asking him questions. He got upset because he was expecting the PM and "didn't know who this guy was", and a physical fight ensued. The investigation was caused by claimant's allegedly threatening to "shoot this place up. It will be like Edmond OK all over again."). *Robert J. Eglington*, 40 ECAB 195 (1988).

Thus an employee can win a workers' compensation claim based on stress from harassment even if the same employee's EEO complaint is or would be unsuccessful.

Emotional stress claims that have been denied FECA coverage include:

- Disputes over denial of advanced sick leave or denials of promotions are not compensable work factors. *Edgar Lloyd Pake*, 33 ECAB 872 (1982). Regarding leave usage see also *Joseph C. DeDonato*, 39 ECAB 1260 (1988) and *Ralph O. Webster*, 38 ECAB 521 (1987), which held that actions taken by the employing establishment in use of leave situations is a personnel matter that does not arise within the performance of duty.
- Stress resulting from failure to provide reasonable accommodation was not compensable where the delay in providing accommodations was caused by the employee's own failure to tell the new job site about his need for them. *Earl D. Smith*, 48 ECAB 615 (1997).
- The refusal of the Agency to allow the employee to return to work or to provide her with vocational rehabilitation is not itself an injury in performance of duty. The employee's emotional reaction to this is self-generated. Failure of Agency to comply with 5 U.S.C. §8152(b)(2) [regarding restoration of duty] does not fall

- within FECA coverage. There is no requirement to provide voc rehab to every employee who is permanently disabled due to a compensable condition under the Act. Billie M. Gentry, 38 ECAB 498 (1987).
- A change in schedule, as opposed to a change in shift. Apostol Gonzalez, 44 ECAB 901 (1993).
  - Frustration over nature of work assignments. David M. Furey, 44 ECAB 302 (1992).
  - Unhappiness over a reassignment, unless shown to be erroneous or abusive. James W. Griffin, 45 ECAB 774 (1994).
  - Emotional upset due to termination from employment for misconduct. Nicholas D. Buckley, ECAB Docket No. 91-673 (1991).
  - Emotional upset at being investigated by employer. Sandra F. Powell, 45 ECAB 877 (1994).

Other emotional conditions (not necessarily caused by “stress”) that can give rise to a valid FECA claim include:

- An emotional condition related to chronic pain and limitations resulting from an employment injury. Arnold A. Alley, 44 ECAB 912 (1993); Charles J. Jenkins, 40 ECAB 362 (1988); Edith A. Berman, 6 ECAB 1028 (1964).

## 16. MSPB appeals and workers’ compensation

An MSPB appeal of an employee’s removal for failure to accept an accommodation position was remanded to the AJ in light of a subsequent OWCP letter reopening appellant’s claim for occupational disease, and because there was no evidence that OWCP had reviewed the suitability of the accommodation position offered to appellant. Smart v Dep’t of the Navy, 92 MSPR 120 (2002). This points out the deference other agencies give to OWCP determinations about suitability of positions offered as accommodations.

An MSPB decision showing error by the Agency was not credited by the OWCP hearing officer; on appeal to ECAB the case was remanded to OWCP for further development by the Board. Error or abuse in a personnel matter (bad performance evaluation and failure to give step increase) may give rise to a workers’ compensation stress claim. Janet I. Jones, 47 ECAB 385 (1996).

An employee’s resignation may not be a bar to her subsequent claim for workers’ compensation lost earnings benefits, when the employee made efforts to find suitable other employment with the Agency before resigning. Catherine G. Hammond, 41 ECAB 375, 385-87 (1990).

## 17. Restoration rights and workers’ compensation injuries

An employee who fully recovers from an industrial injury within one year of the date workers' compensation benefits begin is entitled to mandatory job restoration. 5 U.S.C. §8151(b)(1). In practice, this means that if the employee is terminated less than a year after work-related disability begins, s/he can file an MSPB restoration rights appeal; but unless the employee fully recovers before the one-year elapses, the mandatory job restoration right will expire.

An employee who fully recovers from an industrial injury more than one year of the date workers' compensation benefits begin is entitled to priority in placement, agency-wide, in the same or similar position. 5 U.S.C. §8151(b)(2). An employee who only partially recovers from an industrial injury is only entitled to challenge denials of job restoration based on the Agency's acting arbitrarily and capriciously and/or in a discriminatory manner. The following cases interpret some of these rights.

*New v. Dept. of Veterans Affairs*, 142 F.3d 1259 (Fed. Cir. 1998) – refusal to restore after termination for excessive absences violates restoration rights under 5 C.F.R. §353.303, since absence was substantially related to work injury. The Court held that, absent cause for removal unrelated to employee's compensable injury, agency was required to afford employee priority consideration for restoration, where it had failed to restore her because she had refused to return to work following compensable injury, and Office of Workers' Compensation Programs (OWCP) had not made determination that accommodations offered to her by agency were suitable. The Court also held that the principle that decisions of OWCP do not bind MSPB applies only when MSPB or agency acts within its own statutory sphere of authority.

In *Laura V. King v. Department of the Navy*, 103 LRP 16698 (unpublished, May 2003), the Federal Circuit affirmed the MSPB's decision that the petitioner was entitled to priority consideration for the position she left or an equivalent position. Pursuant to 5 CFR §353.301(b), an individual who fully recovers from a compensable injury more than one year after compensation began is entitled to priority consideration, agency-wide, for restoration to the position she left or an equivalent position. The individual must apply for reappointment within 30 days of the cessation of workers' compensation benefits.

*Allen v United States Postal Serv.*, 73 MSPR 73 (1997) - MSPB has jurisdiction over Postal Service employees' claims that their restoration rights following leave taken for a work-related disability have been violated, regardless of whether they are preference-eligible, or supervisory or managerial employees.

*Chavez v United States Postal Serv.* 85 MSPR 481 (2000) - Court's remand to Board foreclosed finding that Board lacked jurisdiction over appeal from denial of restoration following partial recovery from work-related disability, since court cited regulation expressly authorizing partially recovered employee to appeal improper restoration to Board and reiterated that appellant's claim was expressly within Board's jurisdiction.

*Brathwaite v US Postal Service*, 34 MSPR 239 (1987) - Former employee who resigned from his position for medical reasons and who sought reinstatement but lacked restoration rights, is in position of new applicant seeking re-employment, such that MSPB has no jurisdiction over agency's decision not to rehire former employee. The evidence of record did not indicate that the appellant's medical reasons constituted a compensable injury under FECA.

## **18. Coordination of MSPB appeal rights and disability retirement remedy**

An employee who is terminated for inability to perform essential functions of his or her position is presumed to be entitled to disability retirement benefits; in that case, the removal constitutes prima facie evidence that s/he is entitled to disability retirement, and the burden of production then shifts to OPM to produce evidence sufficient to support a finding that the applicant is not entitled to disability retirement. *Bruner v. OPM*, 996 F.2d 290, 294 (Fed. Cir. 1992). *Marczewski v. OPM*, 80 MSPR 343, ¶ 4 (1998). If OPM meets its burden of production, the applicant must then come forward with evidence to rebut OPM's assertion that s/he is not entitled to benefits. *Klein v. OPM*, 71 MSPR 366, 370 (1996). Notwithstanding the shifting burdens of production, however, the applicant for disability retirement retains the burden of persuasion at all times to establish entitlement. *Id.*

The *Bruner* presumption may apply even if the specific reason for the termination is not physical or mental inability to perform duties. See, e.g., *Bell v. OPM*, MSPB Docket No. CH-844E-99-0600-I-1 (issued 08/11/00) (“Although the Postal Service charged the appellant with failure to meet the requirements of her position, it was clear that the agency removed the appellant because it found that she was unable to perform her duties based on the medical evidence in which various physicians found the appellant's psychological problems incapacitating.”); *Ayers-Kavtaradze v. OPM*, 91 MSPR 397, ¶ 11 (2002)(removal for extended absences is equivalent to removal for physical inability to perform where it is accompanied by specifications indicating that the decision to remove was based on medical documentation suggesting that the appellant was disabled and unable to perform her duties); *McCurdy v. OPM*, 96 MSPR 90 (2004)(also holding that if the termination occurs after OPM's decisions and the Board's initial decision, the case should be remanded for the parties to present evidence and argument relative to the presumption).

An agreement of the parties to an MSPB appeal that the employee's termination be changed to non-disciplinary termination for medical inability to perform duties does not entitle the employee to disability retirement. See *Summers v. OPM*, 48 Fed. Appx. 762; 2002 U.S. App. LEXIS 21677 (Fed. Cir. nonprecedential, 2002)(Employing agency's agreement, in a settlement of wrongful termination case, that the termination be changed to a termination for medical inability to perform duties, and that employee will apply for disability retirement, does not entitle employee to OPM grant of benefits).

The Board has held that parties to a settlement agreement may not bind non-parties. See *Parker v. Office of Personnel Management*, MSPB Docket No. BN-831M-97-0035-R-1 (issued July 11, 2003), in which the Board held, in overruling prior precedent: “Rather, we now hold that, with respect to a settlement agreement to which OPM is not a party, OPM has the authority to determine whether any separation date established by the agreement is an artifice designed to evade the statutory requirements for entitlement to an annuity. Subject to the Board’s review under 5 U.S.C. § 8347, OPM’s authority to question a personnel action taken as a result of a settlement agreement applies whether the statutory provisions at issue implicate filing deadlines, as in *Jordan*, or substantive criteria for entitlement to a retirement benefit, as in this case.”

See also: *Morton v. OPM*, MSPB Docket No. PH-844E-99-0224-I-1 (issued 06/28/01)(VA nursing assistant fired for verbal patient abuse, disrespectful conduct toward a veteran patient, and inappropriate suggestive language toward a veteran patient; on appeal to MSPB, the matter was settled by changing records to show Appellant was fired for physical inability to perform the duties of his position. Despite the fact that OPM found that the appellant's supervisor had indicated no deficiency in his performance until the date of his conduct deficiency, and further found that the record evidence established that the appellant was successfully performing the essential duties of his position prior to his removal, the Board held that it will accept that appellant was separated for physical inability, and afforded Appellant a *Bruner* presumption of entitlement to disability retirement); *Karen B. Lewis v. OPM*, MSPB Docket No. CH-831E-98-0434-I-2 (issued 11/30/00) (“OPM also reiterates its argument below that the Board should not give effect to the settlement agreement between the appellant and the employing agency, by applying the *Bruner* presumption based on the settlement term changing the reason for the appellant's removal from AWOL to "inability to work." PR at 5-6. This argument is also without merit because the Board has held that it will give effect to the terms of a settlement agreement between an applicant for disability retirement and her employing agency, in determining the applicant's entitlement to disability retirement. *Jordan v. Office of Personnel Management*, 77 MSPR 610, 614-17 (1998), *recons. denied*, 86 MSPR 144 (2000) (Acting Chairman Slavet and Member Marshall issued separate opinions disagreeing on this issue). We therefore find that the AJ did not err by applying the *Bruner* presumption here.”

## **19. Coordination of workers’ compensation and disability retirement remedies**

### **a. monetary benefits**

An employee cannot receive disability benefits for wage-loss from both OWCP and OPM at the same time, for the same period of disability. 5 U.S.C. §8116(a). An employee can, however, receive OWCP scheduled award benefits under 5 U.S.C. §8107(c) (for permanent impairment to a listed body part) and OPM disability retirement benefits at the same time. 5 U.S.C. §8116(a). This is because scheduled award benefits

are not designed to compensate for lost earnings, but rather for loss of, or loss of the use of, a body part.

An employee can even receive both OWCP scheduled award benefits and OPM disability retirement benefits if the employee is working in a non-federal job at the time s/he is receiving these dual benefits.

b. accommodation – “suitable employment”

Where OWCP has made a determination that a job offered to applicant by his Agency is “suitable” to the disability under 5 U.S.C. §8106(c), OPM may deny disability retirement benefits if it finds the job was offered on a permanent basis. OWCP’s determination is not binding on OPM, however, since each agency utilizes a different definition of disability; for example, OWCP may find temporary or part-time work suitable, but such work does not qualify as an accommodation barring disability retirement. See Suter v. OPM, MSPB Docket #DA-844E-00-0295-I-1 (03/19/01):

“¶8 Here, both OPM and the AJ relied on New v. Department of Veterans Affairs, 142 F.3d 1259 (Fed. Cir. 1998), and subsequent Board cases involving restoration appeals, e.g., Miller v. U.S. Postal Service, 82 MSPR 170 (1999), for the proposition that OWCP’s determination that the Modified Distribution Clerk position was "suitable work" precluded them from finding that the agency’s reassignment offer was unreasonable [for disability retirement purposes]. Hearing Tape Side 1A; IAF, Tab 9. New, however, states that OWCP decisions do not bind agencies or the Board acting within their own statutory sphere of authority. New, 142 F.3d at 1264. OWCP administers the Federal Employees Compensation Act (FECA), 5 U.S.C. § 8101 *et seq.*, while OPM administers all provisions of FERS, 5 U.S.C. § 8401 *et seq.*, not specifically required to be administered by another authority. 5 U.S.C. § 8461(b). In particular, OPM is required to "adjudicate all claims" and "determine questions of disability" arising under the provisions of FERS administered by OPM, including section 8451. 5 U.S.C. § 8461(c), (d). Furthermore, the Board has statutory authority to adjudicate appeals of administrative actions or orders affecting the rights or interests of individual under the provisions of FERS administered by OPM. *Id.* § 8461(e)(1).

¶9 Thus, OPM and the AJ should not have found that OWCP’s determination was dispositive of the appellant’s rights in this disability retirement application. OWCP determined under 5 U.S.C. § 8106(c)(2) that the appellant had refused "suitable work" as defined under Department of Labor regulations, and so was no longer entitled to compensation. OPM and the Board have an independent statutory responsibility to determine whether the appellant is disabled within the

meaning of 5 U.S.C. § 8451, which governs eligibility for disability retirement under FERS.

¶10 This holding is consistent with our decision in *Daniel v. Office of Personnel Management*, 43 MSPR 599 (1990), where we held that OWCP's determination that an appellant qualifies for compensation is not dispositive of whether he has proved his entitlement to a disability retirement annuity. *Id.* at 603 (citing *Dameron v. Office of Personnel Management*, 40 MSPR 497, 499-500 (1989)). Today, we hold similarly that OWCP's determination that an appellant *does not* qualify for compensation is not dispositive of the appellant's rights under the disability retirement statutes. As our reviewing court recently stated:

FECA provides that if a government employee is injured on the job, the employee is entitled to certain benefits, including compensation for the injury. One of the conditions of continuing to receive those benefits is that a partially disabled employee must be willing to accept "suitable work" when the agency offers such work. . . . The employee's refusal to accept such work results in termination of his FECA benefits. If the employee's disability renders the employee eligible for disability retirement, however, the employee is free to refuse the offer of such work and to take disability retirement instead of the FECA benefits. The two schemes offer different benefits under different circumstances, and there is nothing anomalous about the fact that an employee may be eligible for one set of benefits while being ineligible for the other. *Bracey v. Office of Personnel Management*, No. 00-3034, 2001 WL 38576, at ¶6 (Fed. Cir. Jan. 17, 2001) (internal citations omitted).

¶11 For example, OWCP may find that an employee is capable of working part-time and is therefore ineligible for full benefits, while the Board finds that the part-time duty does not constitute an accommodation in the employee's position or an existing vacant position and that the employee is therefore entitled to a disability retirement annuity. *E.g.*, *Sangenito v. Office of Personnel Management*, 82 MSPR 520, ¶¶ 8-10 (1999), *aff'd on recons.*, 85 MSPR 211 (2000). It also appears that OWCP could determine that a set of ungraded, unclassified set of duties constitutes "suitable work" under its own regulations, but this set of duties would not constitute a "vacant position" to which an employee could be reassigned for purposes of determining his eligibility for disability retirement. See *Bracey*, 2001 WL 38576, at ¶3.

¶12 This does not mean, however, that OWCP's determination of whether an agency's offer constitutes "suitable work" is wholly irrelevant to OPM's and the Board's determination of whether that offer constitutes a reasonable offer of reassignment. In *Trevan v. Office of Personnel*

*Management*, 69 F.3d 520 (Fed. Cir. 1995), our reviewing court held that "OPM and the Board must consider an award of Social Security disability benefits, and any underlying medical data provided to OPM by the Social Security Administration or the employee, *along with any other evidence of disability*, in determining entitlement to FERS benefits." *Id.* at 526 (emphasis added). Although *Trevan*'s holding was based on the court's finding of express Congressional intent to coordinate FERS and Social Security benefits, *id.*, we find that OWCP decisions, and any underlying medical data provided to OPM by OWCP or the employee, are "other evidence of disability" as contemplated by *Trevan*. Thus, OPM and the Board must consider an award or a termination of OWCP benefits, but may find that this evidence is outweighed by other medical evidence. *See id.* (in a disability retirement application under FERS, OPM and the Board must consider an award of Social Security disability benefits, but may find that this evidence is outweighed by inconsistent and inadequate medical evidence)."

See also: *Smith v. OPM*, MSPB Docket # AT-844E-00-0140-I-1 (03/12/01)(letter carrier offered suitable employment as clerk is entitled to disability retirement, since this was a change in crafts):

¶9 The statute at 5 U.S.C. § 8451(a)(2)(A) provides that an employee shall not be eligible for a disability retirement under FERS if, under conditions set forth in the statute, she declines a reasonable offer of reassignment to a vacant position in the agency for which she is qualified. Section 8451(a)(2)(D), however, states that, for purposes of section 8451(a)(2)(A), "an employee of the United States Postal Service shall not be considered qualified for a position if such position is in a different craft or if reassignment to such position would be inconsistent with the terms of a collective-bargaining agreement covering the employee." In her argument before the administrative judge, the appellant referred to the definition of "vacant position" contained in 5 C.F.R. § 844.102, which incorporates the language of 5 U.S.C. § 8451(a)(2)(D) quoted above. IAF, Tab 8.

¶10 The appellant stated, without contradiction, that the duties to which she was assigned on February 5, 1998, consisted mainly of answering telephones, that these and her other duties were those of an employee in the Clerk craft, and that the Clerk's union had filed a grievance against her under its collective bargaining agreement because, as a non-member of the Clerk craft, she could not perform such work. Hearing Tape (HT), Side A; *see also* IAF, Tab 8, Ex. A. She also said, again without any contrary evidence from OPM, that because the Postal Service could not accommodate her in the Rural Carrier craft, it gave her the duties of answering telephones, and that when she told the Postal Service that she

did not want to continue answering telephones, it offered her the Modified Part-time Regular Distribution Clerk position. HT, Side A.

¶11 As discussed above, the appellant provided un rebutted sworn testimony that the duties to which she was assigned as of February 5, 1998, were in the Clerk craft, and that there was no accommodation available to her in the Rural Carrier craft. Her testimony on this point is supported by a March 1, 2000 signed statement from the Postmaster of the Sebring, Florida, facility that "[t]he rehabilitation job offer made to [the appellant] on February 24, 1999 is the only position and accommodations that are available at this time." IAF, Tab 11. Further support is provided by an October 16, 1998 supervisor's statement accompanying the appellant's disability application in which her supervisor wrote in response to a question regarding accommodation and reassignment: "Employee unable to work any aspect of Rural Carrier position." *Id.*, Tab 4, Subtab II-D. Moreover, although the Board need not decide whether to consider the letter attached to the appellant's petition for review as new and material evidence, the Board notes that the letter, which is signed by Ray Pannone, Officer in Charge of the Sebring facility, states that "there are no provisions to reasonably accommodate [the appellant] within the Rural Route craft due to her medical restrictions." PFRF, Tab 1.

¶12 The undisputed evidence establishes that the Postal Service cannot accommodate the appellant in her Rural Carrier craft. Further, the unchallenged evidence shows that the Postal Service attempted to accommodate the appellant's medical conditions by assigning her to duties or positions in the Clerk craft. Under 5 U.S.C. § 8451(a)(2)(D), the appellant was not qualified for assignment to any position in a craft other than her Rural Carrier craft. Given these facts, the Board finds that the appellant cannot be accommodated within the terms of the statute. See *Peterson v. Office of Personnel Management*, 81 MSPR 211, ¶ 19 (1999)."

## **20. Disability retirement (FERS) and Social Security Disability**

The definition of disability for Social Security purposes in 42 U.S.C. §423(d)(2)(A), includes the following: "[a]n individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy."

Despite Congress' purpose of providing a coordinated system, receipt of Social Security benefits does not per se establish disability under FERS. The Board arrived at this result because the standards for determining disability under the Social Security Act

and regulations differ from the standard for determining disability under the civil service law and regulations. *Wilmot v. OPM*, 35 MSPR 238 (1987). *Trevan v. OPM*, 69 F.3d 520 (Fed. Cir. 1995).

A Social Security disability award, however, is relevant to a FERS disability retirement determination. See: *Pritchard v. OPM*, 70 MSPR 453, 458 (1996) (remanding to the AJ for consideration of SSA disability benefits award); *Redmond v. OPM*, 90 MSPR 4, ¶¶11-15 (2001) (reversing the initial decision and finding the appellant entitled to FERS disability retirement based on a "new" SSA decision awarding her disability benefits, where the medical evidence of disability was uncontroverted).

## **21. Workers' compensation and Social Security benefits**

No election of benefits is required between OWCP benefits and Social Security Disability benefits. The benefits are coordinated, so that the some employees cannot receive the full benefit from Social Security while receiving OWCP benefits at the same time. See FECA Procedure Manual 2-1000-11:

“2-1000-11 Social Security Benefits

11. Social Security Benefits. References: FECA Program Memoranda Nos. 10, 20 and 81.

a. OASD Benefits. Old age, survivors, and disability under Title II of the Social Security Act, as amended, are insurance benefits paid from the Social Security insurance fund. These payments are financed by the contributions of employees and employers through the Social Security tax, and are not financed by the United States. Social Security benefits are payable only to persons insured under the system by their respective payments to the system's insurance fund.

b. Dual Payment Not Prohibited. OWCP does not require an election between FECA benefits and Social Security benefits, except when they are attributable to the employee's Federal service (see paragraph 4e above). The Social Security Act was amended on July 30, 1965, providing for a reduction in Social Security benefits to certain individuals receiving workers' compensation. Inquiries concerning this situation should be referred to the Social Security Administration. That agency will inform the beneficiary concerning the possible reduction of Social Security benefits.”

On the other hand, where an employee is entitled to OWCP benefits, Social Security benefits, and FERS retirement benefits (because he worked part of his life as a federal employee covered under FERS), there is a more complicated coordination of benefits.

THE LAW OFFICE OF STEVEN E. BROWN  
850 Hampshire Road, Suite G  
Westlake Village, CA 91361-2800

voice – 805-496-9777  
fax – 805-496-6368  
email – [sbrownesq@federal-law.com](mailto:sbrownesq@federal-law.com)

This is described in FECA Bulletin No. 97-09, which is included in these materials as ***Attachment F***.

General information about Social Security Disability Benefits eligibility requirements is included in these materials as ***Attachment G***.