

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACQUELINE FLAHERTY and DEPARTMENT OF AGRICULTURE,
AGRICULTURAL STABILIZATION & CONSERVATION SERVICE, Pittsfield, Mass.

*Docket No. 97-150; Submitted on the Record;
Issued December 3, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On April 17, 1992 appellant, then a 49-year-old program assistant, filed a claim for aggravation of angina which she attributed to a heavy work load and aggravation by her supervisor. In an August 28, 1992 decision, the Office rejected appellant's claim on the grounds that the evidence of record failed to demonstrate that appellant's claimed injury occurred in the performance of duty. Appellant requested a hearing before an Office hearing representative which was conducted on May 18, 1993. In a July 29, 1993 decision, the Office hearing representative noted that appellant had expanded her claim to include a claim for a psychiatric condition. The hearing representative concluded that the factors of employment that appellant alleged caused her condition were either not established as factual or not within the scope of employment. The hearing representative stated that the evidence which showed appellant performed duties assigned to her coworker and her supervisor also showed that she had been instructed by the employing establishment not to take on those responsibilities. The hearing representative therefore concluded that appellant's conditions did not arise from her regularly assigned or specially assigned duties but from her self-inflicted work load. The hearing representative found that appellant had not established that her supervisor criticized her or acted abusively or harassed her. She noted that appellant had filed an Equal Employment Opportunity complaint but no decision had been issued in response to the complaint. The hearing representative indicated that a statement submitted by a former coworker in support of appellant's claim was too general in nature. She further found that other factors such as appellant's failure to receive a special pay rate increase and the notice that her position might be downgraded were not compensable factors of employment because disability arising from a claimant's feeling of job insecurity or a desire to hold a particular position did not constitute an injury while in the performance of duty. The hearing representative therefore affirmed the Office's August 28, 1992 decision.

In an October 22, 1993 letter, appellant requested reconsideration. She submitted statements from two former coworkers on incidents relating to interactions with their common supervisor. In a June 19, 1995 merit decision, the Office denied appellant's request for modification of the July 29, 1993 decision. In an accompanying memorandum, a senior claims examiner stated that the statements from appellant's former coworkers related only to comments made to them by the supervisor and not comments made by the supervisor to appellant. He concluded, therefore, that the evidence did not show that appellant was subjected to sexual harassment.

In a May 31, 1996 letter, appellant again requested reconsideration. She submitted a February 16, 1996 report from Dr. Harold J. Bursztajn, a Board-certified psychiatrist, who diagnosed post-traumatic stress disorder and related appellant's condition to harassment from her supervisor. In a September 11, 1996 decision, the Office rejected appellant's request for reconsideration on the grounds that the evidence submitted in support of the request was immaterial and therefore insufficient to warrant reconsideration of the Office's prior decision. In an accompanying memorandum, a second senior Office claims examiner stated that while Dr. Bursztajn's report dealt with the medical aspects of appellant's claim, no new evidence had been submitted which addressed the deficiencies of the factual evidence. He commented that appellant had not established that a pattern of sexual harassment toward her had actually occurred.

The jurisdiction of the Board extends only to final decisions of the Office issued within one year prior to the filing of an appeal with the Board.¹ As appellant's appeal was filed on September 24, 1996, the only decision before the Board on appeal is the Office's September 11, 1996 decision denying appellant's request for reconsideration.

The Board finds that the Office improperly denied appellant's request for reconsideration.

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.² Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.³ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.⁴

¹ 20 C.F.R. § 501.3(d).

² 20 C.F.R. § 10.138(b)(2).

³ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

⁴ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

The Office found that Dr. Bursztajn's report was immaterial on the grounds that appellant had not submitted any evidence to substantiate her contention that she was subjected to sexual harassment by her supervisor. However, appellant, in her October 22, 1993 request for reconsideration, had submitted such evidence in the statements from her former coworkers. The Office inaccurately stated that the statements from the coworkers did not describe incidents involving appellant. One coworker related specific incidents involving appellant and her supervisor. She stated whenever the automotive coordinator came into the office for training or repair of the computer system, appellant's supervisor would state to appellant, and to whomever else was present, that he was surprised to see appellant at work after she had sex all night with the automotive coordinator. On one occasion, the supervisor stated that he was surprised appellant had not thrown her back out after being out with the automotive coordinator. The coworker commented that the supervisor at times would state that appellant was having an affair with various men who came into the employing establishment. The coworker indicated that the supervisor would constantly criticize appellant in front of witnesses and would always wait for an audience before criticizing appellant or making his sexual comments or suggestions. This statement corroborates appellant's contention that the supervisor would criticize her only when other people were present. Dr. Bursztajn specifically cited the former coworker's statement as the historical basis for his conclusion that appellant's condition was caused by harassment by work. The Office therefore was been presented with relevant, credible evidence, which it did not consider fully, that appellant was subjected to specific incidents of harassment and public criticism in front of witnesses. These incidents if established would constitute compensable factors of employment. The Office also received medical evidence that relates appellant's condition was causally related to such specific incidents of harassment. In light of the factual evidence previously submitted to the Office in the form of a statement of a coworker, the report of Dr. Bursztajn is material and relevant to the issue of whether appellant has any disability causally related to compensable factors of employment. The case must therefore be remanded for a *de novo* review and decision on whether appellant has established that there were compensable factors of employment in the performance of her duty and, if so, whether these factors were causally related to her disability.

The decision of the Office of Workers' Compensation Programs, dated September 11, 1998, is hereby reversed.

Dated, Washington, D.C.
December 3, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member