

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AVA S. MADDOX and DEPARTMENT OF THE AIR FORCE,
PATRICK AIR FORCE BASE, FL

*Docket No. 02-556; Submitted on the Record;
Issued July 24, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for merit review.

The Board has carefully reviewed the case record and finds that the Office acted within its discretion in refusing to conduct a merit review of appellant's claim.

Section 8128(a) of the Federal Employees' Compensation Act¹ vests the Office with discretionary authority to determine whether it will review an award for or against compensation.²

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).³ The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.⁴ Section 10.608(b) provides that when a request for reconsideration is

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8128(a) ("The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

³ 20 C.F.R. § 10.608(a) (1999).

⁴ 20 C.F.R. § 10.606(b)(1)-(2) (1999).

timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.⁵

In this case, appellant's claim for work-related hypertension filed on June 18, 1999 was denied by the Office on October 1, 1999 on the grounds that she had failed to establish that her condition was sustained in the performance of duty.⁶ Appellant requested a review of the written record, and the hearing representative affirmed the denial of compensation on March 23, 2000. The hearing representative stated that appellant had failed to establish any compensable factors of employment.

Appellant requested reconsideration and submitted copies of sworn testimony from the proceedings regarding her Equal Employment Opportunity (EEO) complaint against the employing establishment as well as copies of medical and factual evidence previously considered. On May 4, 2000 the Office denied appellant's request on the grounds that the evidence submitted was insufficient to warrant modification of its prior decision. The Office noted that appellant had failed to provide corroborating evidence supporting her allegations of harassment or error of abuse by the employing establishment.

Appellant again requested reconsideration and submitted a "reorganized" version of documents previously considered. On July 14, 2000 the Office denied appellant's request on the grounds that the evidence submitted was repetitious and, therefore, insufficient to require merit review.

On August 4, 2000 appellant requested reconsideration, which was denied on August 31, 2000 on the grounds that the evidence and arguments submitted were insufficient to warrant modification of the Office's previous decision. The senior claims examiner stated that he would review all of appellant's "alleged stressors" and attempt to "explain as thoroughly as possible" why appellant had failed to establish any compensable factors of employment.

On September 19, 2000 appellant again requested reconsideration claiming that the Office was "actively participating" in workers' compensation fraud in collusion with the employing establishment. On October 18, 2000 the Office denied reconsideration on the grounds that the arguments submitted were insufficient to warrant merit review of the claim.

Appellant's representative requested reconsideration on August 16, 2001 and submitted two medical reports. On November 5, 2001 the Office denied appellant's request on the grounds that the evidence submitted was immaterial and therefore insufficient to warrant merit review.

The only Office decision before the Board on appeal is dated November 5, 2001, denying appellant's request for reconsideration. Because more than one year has elapsed between the last

⁵ 20 C.F.R. § 10.608(b) (1999).

⁶ The employing establishment terminated appellant's employment effective August 13, 1999, prior to the end of her one-year probationary period.

merit decision dated August 31, 2000 and the filing of this appeal on January 25, 2002, the Board lacks jurisdiction to review the merits of appellant's claim.⁷

With her August 16, 2001 request for reconsideration, appellant submitted medical evidence that her hypertension was "dramatically exacerbated by her work environment" and that the cataracts in her eyes resulted from the medication she took for her high blood pressure from November 1998 to August 1999.

In emotional condition cases, the Board has long held that only after an employee has met her burden of proof to establish compensable factors of employment will the medical evidence in her case be considered to determine if those factors caused her condition.⁸ As the Office explained in its August 31, 2000 decision, appellant has yet to establish a compensable factor, mainly because she has provided no corroborating evidence of her allegations of harassment and error or abuse on the part of the employing establishment. In that decision, the Office noted that such evidence could consist of a grievance ruling or administrative decision in her favor that showed managerial error or abuse, but that the record contained no such documents.⁹

The Board finds that the evidence submitted by appellant with her request for reconsideration is immaterial to the issue of whether she established a compensable factor of employment and therefore she has not met the requirement of subsection (iii) of section 10.606(b)(2). Also, appellant has presented no new legal argument. Nor has she shown that the Office misapplied the law. Inasmuch as appellant has failed to meet any of the requirements for reopening her claim for merit review, the Board finds that the Office acted within its discretion in denying her request for reconsideration.¹⁰

⁷ 20 C.F.R. §§ 501.2(c); 501.3(d)(2). See *John Reese*, 49 ECAB 397, 399 (1998).

⁸ *John Polito*, 50 ECAB 347, 350 n. 18 (1999).

⁹ The record contains a decision on appellant's grievance regarding her performance appraisal, which indicated that her supervisor correctly rated one of her critical elements. The Office noted that the transcripts from an EEO investigation showed that no harassment had occurred.

¹⁰ See *Eugene L. Turchin*, 48 ECAB 391, 397 (1997) (finding that evidence submitted on reconsideration regarding the occurrence of several industrial accidents was irrelevant to appellant's burden of proof to establish the timely filing of his claim and was therefore insufficient to warrant merit review by the Office).

The November 5, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
July 24, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member