United States Department of Labor
Employees' Compensation Appeals Board

F.D., claiming as widow of S.D., Appellant	)	
and	)	**Docket No. 06-1937**
	)	**Issued: March 9, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Spring Valley, CA, Employer	)	

Appearances:
Appellant, pro se
No appearance, for the Director

Oral Argument February 6, 2007

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 30, 2006 appellant filed a timely appeal of a June 2, 2006 nonmerit decision of the Office of Workers' Compensation Programs, which denied her request for reconsideration. Because more than one year elapsed between the most recent merit decision of June 9, 2005 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim under 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a). On appeal, appellant contends that the Office failed to address the medical evidence or address her arguments concerning the statement of accepted facts.

FACTUAL HISTORY

This case has previously been before the Board. In a January 24, 2000 decision,[1] the Board found that the factual evidence established a compensable factor under *Cutler*, in that the employee's postal route required more than eight hours to prepare and complete.[2] The Board remanded the case to the Office for further development. The facts of the case are set forth in the Board's prior decision and are incorporated by reference. The record reflects that, on August 13, 2001, the Office accepted the claim for adjustment disorder with mixed anxiety and depressed mood. It authorized compensation for the period July 12 to October 23, 1997, the date the emotional condition was found to have resolved.

The employee died on April 12, 2001. The cause of death listed on the death certificate was metastatic colon cancer. On September 3, 2003 appellant, the employee's widow, filed a claim for survivor's benefits (Form CA-5) alleging that the employee's death was causally related to his accepted employment injury. She submitted medical and factual evidence, including a copy of the death certificate and a June 20, 2003 report from Dr. Paul Rosch, a Board-certified internist. Based upon a review of the employee's medical record and factual evidence from his occupational disease claim, Dr. Rosch opined that the employee was subjected to severe and persistent stress at work. He stated that "[a]lthough not easy to prove, it is also my opinion that job stress contributed to the development and fairly rapid downhill course of his colon cancer." Dr. Rosch noted that stress had been shown to accelerate the spread and growth of malignant tumors as emotional stress "has been shown to depress natural killer cells and other immune system components responsible for resistance to carcinogens." He noted exceptions in attributing the employee's cancer to stress, but concluded that they could be dismissed in the employee's case "because of the well-documented harassment at work he was subject to, the temporal relationship with his symptoms of colon cancer and the absence of other competent contributing causes." Dr. Rosch concluded that the employee's stress at work contributed to the development and rapid progression of his colon cancer.

By decision dated March 23, 2004, the Office denied appellant's claim for survivor's benefits, finding that the medical evidence failed to establish that the employee's death was due to his employment injury. The Office found that the medical evidence was insufficient to establish that the employee's death was causally related to the accepted emotional condition.

On April 21 and May 3, 2004 appellant requested reconsideration. In support of her request, she presented legal arguments and submitted medical and factual evidence including the April 30, 2004 report of Dr. Rosch who stated that the employee's inability to complete his work

[1] Docket No. 99-1439 (issued January 24, 2000). On May 26, 1998 the Office denied the employee's emotional condition claim on the basis that he failed to establish a compensable factor of employment. An Office hearing representative affirmed the denial of his claim on December 31, 1998. The Board adopted the decision of the hearing representative to find that the employee had not substantiated his allegations of harassment or discrimination.

[2] *See Lillian Cutler*, 28 ECAB 125 (1976).

duties in eight hours "created an atmosphere of severe and persistent stress." Dr. Rosch opined that this type of stress, when associated with overwork and fatigue, "can weaken immune system resistance to cancer."

On August 16, 2004 the Office received a report by Dr. Suresh B. Katakkar, a second opinion Board-certified internist with a subspecialty in medical oncology. Dr. Katakkar reviewed the employee's medical records, a statement of accepted facts and the reports of Dr. Rosch. He opined that he did not believe that the employee's stress had induced the cancer. Dr. Katakkar generally agreed with Dr. Rosch that "stress can cause a problem over a period of time."

By decision dated August 20, 2004, the Office denied modification of the March 23, 2004 decision.

In a supplemental report dated September 7, 2004, Dr. Katakkar opined that the employee's colon cancer was unrelated to the accepted condition of mixed anxiety disorder or adjustment disorder. He stated that employee's accepted depression did not cause or induce his cancer.

By decision dated September 22, 2004, the Office denied modification of the August 20, 2004 decision. It found that the weight of the medical opinion evidence of record was represented by Dr. Katakkar.

On October 12, 2004 appellant requested reconsideration. She contended that the statement of accepted facts should be revised to include harassment and retaliation as compensable factors of employment. Appellant submitted two pages of an April 24, 2002 Equal Employment Opportunity Commission (EEOC) decision in support of her request.

By decision dated January 12, 2005, the Office denied modification of the September 22, 2004 decision.

In a letter dated March 8, 2005, appellant requested reconsideration and submitted a report from Dr. Bernard S. Siegel, a Board-certified surgeon, who reviewed the employee's medical records and work history and indicated his agreement with Dr. Rosch. Dr. Siegel stated that the work stress the employee was under "contributed to the rapid progression of his disease."

By decision dated June 9, 2005, the Office denied modification of the January 12, 2005 decision.

By letter dated May 15, 2006, appellant requested reconsideration. She submitted arguments pertaining to the medical evidence of record. Appellant also submitted a copy of the transcript of proceedings before Administrative Judge Dennis Carter in her husband's EEOC claim and a letter from Bruce Lane, the employee's former supervisor and manager of human resources at the employing establishment. She contended that this evidence warranted modification of the statement of accepted facts to accept harassment as a compensable work factor.

By decision dated June 2, 2006, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant further merit review of the case.

LEGAL PRECEDENT

The Federal Employees' Compensation Act[3] provides under section 8128(a) that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.[4] The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.[5]

An employee seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[6]

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[7] A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[8]

ANALYSIS

In the prior appeal, the Board issued a January 24, 2000 decision on the employee's claim of an employment-related emotional condition, for which he was disabled from July 11 to October 28, 1997. The Board found that the record established a compensable factor of employment under *Cutler*, namely that his postal route required more than eight hours to prepare and complete.[9] The Board also adopted the December 31, 1998 decision of an Office hearing representative to find that his allegations of harassment and discrimination were not factually

[3] 5 U.S.C. §§ 8101 *et seq.*

[4] 5 U.S.C. § 8128(a). *See Tina M. Parrelli-Ball*, 57 ECAB ___ (Docket No. 06-121, issued June 6, 2006).

[5] 20 C.F.R. § 10.605.

[6] *Id*. at § 10.606. *See Susan A. Filkins*, 57 ECAB ___ (Docket No. 06-868, issued June 16, 2006).

[7] *Id*. at § 10.607(a). *See Joseph R. Santos*, 57 ECAB ___ (Docket No. 06-452, issued May 3, 2006).

[8] *Id*. at § 10.608(b). *See Candace A. Karkoff*, 56 ECAB ___ (Docket No. 05-677, issued July 13, 2005).

[9] *See supra* note 2.

established. The case was remanded to the Office for further development. On August 13, 2001 the Office accepted that the employee sustained an adjustment disorder with mixed anxiety and depressed mood for the claimed period. Compensation benefits were awarded from July 12 to October 23, 1997.

On April 12, 2001 the employee passed away following treatment for colon cancer. Appellant, his widow, has pursued a claim since 2003 contending that his death was contributed to by stress arising in his federal employment from incidents of harassment and discrimination. The prior Office merit decisions have noted that the statement of accepted facts prepared in this case, premised on the Board's 2000 decision, "cannot be altered pending the receipt of credible, factual evidence…."[10]

The June 2, 2006 decision of the claims examiner sets forth the arguments raised by appellant with her request for reconsideration. Her first four arguments addressed the quality of the medical evidence previously of record and, following a limited review, the claims examiner noted that no new medical evidence was submitted since the June 9, 2005 merit decision. In this respect, the claims examiner properly found that appellant had not provided a basis for further merit review. However, the claims examiner went on to examine the fifth and sixth points raised by appellant: her argument that there is more than one compensable factor giving rise to the employee's emotional condition.

Appellant submitted new factual evidence to the record consisting of three volumes of transcripts related to a proceeding before the EEOC and the comments of the presiding Administrative Judge. She also submitted a statement from the employee's former superior. The June 2, 2006 decision addresses this material, stating: "[t]he additional findings concerning the factual evidence are incidental since the denial of the claim is due to a failure to establish causal relationship." To this extent, the claims examiner applied an improper standard to the evidence submitted by appellant.

It is well established that the requirement for reopening a claim for further merit review before the Office does not include the necessity that claimant submit all evidence necessary to discharge his or her burden of proof.[11] Rather, the requirement for reopening a case specifies only that the evidence be relevant, pertinent and not previously considered by the Office.[12] The presentation of such new evidence creates the necessity for review of the full case record in order to properly determine whether the newly submitted evidence would warrant modification of an earlier decision. Analyzing whether a claimant established causal relationship is not the proper standard for determining whether a case should be reopened for merit review. Rather, it is a standard applicable when conducting a merit review.[13]

[10] *See* September 22, 2004 decision of the Office, page 2. The statement of accepted facts appears premised on the Board's January 24, 2000 decision.

[11] *See Sydney W. Anderson*, 53 ECAB 347 (2002); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

[12] 20 C.F.R. § 10.606(b)(2)(iii).

[13] *See Joseph L. Cabral*, 44 ECAB 152, 156 (1992).

The error in the claims examiner's decision is that he does not apply the regulatory standard to the evidence submitted. Rather, he articulated an "incidental" standard: "[t]he additional findings concerning the factual evidence are incidental since the denial of the claim is due to a failure to establish causal relationship." The Office previously denied amending the statement of accepted facts pertaining to the accepted compensable factor absent the receipt of new credible, factual evidence. Appellant submitted new factual evidence to the Office with her reconsideration request, arguing that the materials from the EEOC proceedings and statement of decedent's former superior substantiated his allegations of harassment. This was sufficient to require further merit review by the Office. As the June 2, 2006 decision stands, the reference to "[t]he additional factual findings" is obscure. There is no definitive finding of fact or statement of reason as to whether the evidence submitted by appellant is sufficient to establish an additional compensable factor or to modify the statement of accepted facts.

The Board previously accepted a compensable employment factor under *Cutler*. In turn, it relied on the 1998 finding of an Office hearing representative to deny harassment or discrimination as being factually established. Appellant supplemented the record in 2006 with new factual evidence relevant to these prior factual determinations. If this evidence is sufficient to establish harassment, as alleged, the Office would have to consider how such a factor pertains to the medical evidence of record. If the Office finds that the evidence does not establish harassment, as alleged, the basis for such a factual finding should be made clear after appropriate merit review.

CONCLUSION

The Board finds the Office improperly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

ORDER

IT IS HEREBY ORDERED THAT the June 2, 2006 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded to the Office for further action consistent with this decision.

Issued: March 9, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board