United States Department of Labor
Employees' Compensation Appeals Board

F.V., Appellant	)	
and	)	**Docket No. 08-1184**
	)	**Issued: November 10, 2008**
U.S. POSTAL SERVICE, SANTA CLARA POST OFFICE, Santa Clara, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 3, 2007 appellant filed a timely appeal of a June 18, 2007 nonmerit decision of the Office of Workers' Compensation Programs, denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's May 19, 2006 decision denying appellant's emotional condition claim. Because more than one year has elapsed between the last merit decision dated May 19, 2006 and the filing of the appeal, the Board lacks jurisdiction to review the merits of his claim.[1]

ISSUE

The issue is whether the Office properly denied further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

On December 17, 2005 appellant, then a 30-year-old city letter carrier, filed an occupational disease claim alleging that he first became aware of his emotional condition on November 2, 2004 and that on March 15, 2005 he realized it was employment related. He stopped work on July 28, 2005.[2]

On December 22, 2005 the Office received factual and medical information including an undated statement and June 26, 2005 statement by appellant, a June 17, 2005 letter directing appellant for a fitness-for-duty evaluation; an undated statement regarding June 15, 2005 by Larry Saclayan, supervisor, Mission Station; a June 17, 2005 statement by Richard Cooper, manager, Mission Station; statements dated September 29 2005 by Terry Medeiros, supervisor, customer service, Carolyn G. McAlliser, manager, customer service; a June 23, 2006 e-mail regarding appellant's fitness for duty; a June 20, 2005 letter from Cathy Shearer, postmaster, to Dr. Aftim Saba, an employing establishment physician, requesting a fitness-for-duty evaluation on appellant; a September 2, 2005 statement by Brian Voigt, Union Executive Vice President, noting that the fitness-for-duty information provided to Dr. Saba failed to contain information regarding an incident between appellant and another employee; an undated statement by Phyllis Goff, a coworker; an undated statement by Kirk Yokoyama, supervisor; disability notes dated September 11 and December 16, 2005 by Ms. Avila-Pandey, M.S., a marriage and family therapist; the first page of a March 24, 2004 Equal Employment Opportunity (EEO) Commission decision; a July 28, 2005 settlement agreement regarding appellant's fitness-for-duty examination and a July 14, 2006 Social Security Administration decision denying his claim for disability benefits.

In a September 11, 2005 note, Ms. Avila-Pandey requested appellant's disability leave be extended to September 11, 2005 and possibly September 19, 2005 from September 4, 2005. In a December 16, 2005 disability note, she requested that the employing establishment authorize appellant's leave request for November and December 2005 and released him to modified work on December 19, 2005.

In a June 16, 2005 statement, appellant alleged that he was subjected to harassment and discrimination by coworkers and supervisors for the past two years. He also alleged an unsafe work environment. In an undated statement, appellant alleged that for the past 18 months he had been discriminated against and harassed by management and his coworkers. He also alleged that nothing was done by management or the union when he informed them of the harassment. Appellant also claimed his work environment is hostile and unsafe. Specifically, he alleged management and coworkers called him an illegal alien, gay and a cry baby; that he was falsely accused of sexually harassing female coworkers, that no action was taken regarding his coworkers harassing him and that he was required to undergo a fitness for duty without any basis or prior disciplinary action. As a result of all these actions, appellant has regular panic attacks and suffers depression.

[2] Appellant was removed from the employing establishment for being absent without leave effective March 10, 2006.

By letter dated January 10, 2006, the Office informed appellant the evidence was insufficient to support his claim. Appellant was advised as to the type of factual and medical evidence required to support his emotional condition claim.

On May 18, 2006 the Office received a complete copy of an April 16, 2004 EEO Commission decision dismissing and rejecting appellant's claims of discrimination and harassment for investigation.

By decision dated May 19, 2006, the Office denied appellant's claim, finding that he did not sustain an emotional condition in the performance of duty. It found the factual evidence of record insufficient to establish his claims of harassment and discrimination.

On March 9, 2007 appellant requested reconsideration.[3] In support of his claim, he submitted medical and factual evidence including his March 9, 2007 statement; copies of two grievances and a settlement agreement regarding his failure to submit medical evidence to support leave used in May and June 2005; a March 15, 2005 memorandum to appellant placing him on restricted sick leave and an undated statement by Ms. Goff; an undated statement regarding June 15, 2005 by Mr. Saclayan; an undated statement from Mr. Yokohama; a June 17, 2005 letter directing appellant for a fitness-for-duty evaluation; a summary of a February 26, 2004 meeting; March 21, 2005 no agreement letter regarding the inability to resolve a dispute between appellant and Ms. Goff and Mr. Cooper; a June 17, 2005 statement by Mr. Cooper; an undated newspaper article; a January 25, 2007 letter from the U.S. Office of Special Counsel informing him it lacked jurisdiction over his complaint; an April 14, 2006 letter from the EEO Commission informing him that it lacked subject matter jurisdiction over his complaint; a March 9, 2004 Notice of Right to File an Individual Complaint form and a March 24, 2004[4] acknowledgement of receipt of an EEO complaint; a July 14, 2006 letter from the EEO Commission informing appellant that his claim of discrimination was pending and a subsequent letter dated December 6, 2006 enclosing a November 7, 2006 decision, which dismissed his appeal; reports dated September 1 and 11, 2005, January 19 and 27, 2006 by Dr. Saba to Ms. Avila-Pandey regarding his return to modified work; a copy of an April 5, 2005 EEO complaint alleging harassment and racial discrimination; an undated work analysis report for May and June 2005; an August 5, 2005 leave analysis form;[5] a July 18, 2006 letter from the National Labor Relations Board (NLRB) rejecting appellant's appeal; a September 2, 2005 statement by Mr. Voigt; a May 24, 2005 agreement that work-related conversations are to be done in private; a February 7, 2006 letter informing appellant that proper medical documentation for leave since December 26, 2005 had not been submitted and a June 20, 2005 letter to Dr. Saba

[3] The record contains an April 9, 2007 memorandum to file noting that three photographs had been received on April 6, 2007 but were not scanned or retained for the file. There is no indication as to what the photographs were or what information was on the compact disc. As the Office did not retain this evidence for the record and the relevance of this evidence is not readily discernable regarding the issue in question, the Board is unable to make any determination regarding it. *See, e.g., G.G.*, 58 ECAB ___ (Docket No. 06-1564, issued February 27, 2007) (the Board has no jurisdiction to review evidence that was not before the Office at the time of its final decision). *See also* 20 C.F.R. § 501.2(c).

[4] The author date is noted as March 25, 2004.

[5] IFECS notes the author date as August 5, 2006.

by Ms. Shearer; a March 9, 2006 letter from the employing establishment notifying him of his separation from federal employment; appellant's undated statement; a December 29, 2005 letter of demand -- payroll advance from the employing establishment; and a December 8, 2005 letter informing appellant he was considered absent without leave as of December 1, 2005.

In his March 9, 2007 statement, appellant reiterated his allegations of harassment, disparate treatment and working in an unsafe workplace. Specifically, he alleged that the union did nothing when he was suspended and required to undergo a fitness-for-duty examination. Appellant also alleged that he was treated differently because he was Hispanic and had no influence than a former supervisor, Jerome Hippol, who was demoted instead of being fired in 2004. In support of his allegation that he was unfairly disciplined and subjected to different treatment, he noted that a coworker had been drinking during work time and this coworker was not suspended or required to have a fitness-for-duty examination while appellant was. Appellant also reiterated his allegation that coworkers called him names such as slacker and gay. He also alleged that he was harassed because he would not wear the employing establishment regulation cap. Appellant related that he became upset when Mr. Copper had new caps in his office which were handed out to people except for appellant.

By nonmerit decision dated June 18, 2007, the Office denied appellant's request for reconsideration. It found the medical and factual evidence submitted in support of his request were repetitive and cumulative.[6]

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,[7] the Office's regulation provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[8] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[9] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.[10]

[6] The Board notes that, following the June 18, 2007 nonmerit decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. § 501.2(c); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

[7] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

[8] 20 C.F.R. § 10.606(b)(1)-(2). *See Susan A. Filkins*, 57 ECAB 630 (2006).

[9] *Id.* at § 10.607(a).

[10] 20 C.F.R. § 10.608(b). *See Tina M. Parrelli-Ball*, 57 ECAB 598 (2006) (when an application for review of the merits of a claim does not meet at least one of the three regulatory requirements the Office will deny the application for review without reviewing the merits of the claim).

ANALYSIS

On March 9, 2007 appellant disagreed with the Office's May 18, 2006 decision, which denied his claim on the grounds that the evidence of record did not establish any compensable work factors. The underlying issue on reconsideration was whether he established a compensable factor of employment with regard to his emotional condition claim. The Board finds that appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant new argument not previously considered nor did he provide any relevant or pertinent new evidence regarding whether he sustained an emotional condition in the performance of duty.[11]

In his March 9, 2007 statement, which was received on March 26, 2007, appellant essentially reiterated his previous arguments regarding harassment, an unsafe workplace and inappropriate discipline. As noted above, he made these allegations with his initial complaint, which the Office found were unsubstantiated or noncompensable. The Board finds that as appellant reiterated his prior contentions regarding the actions at the employing establishment which he believed were stressful, that were previously reviewed and considered by the Office, they were insufficient to warrant further merit review. As the Board has held, the submission of evidence which repeats or duplicates evidence that is already in the case record does not constitute a basis for reopening a case for merit review.[12]

Appellant submitted documents concerning the denial of his disability claim by the Social Security Administration; his complaint to the U.S. Office of Special Counsel; grievances; settlement agreements; appeals and decisions by the NLRB and the EEO Commission, letters from the employing establishment requesting repayment of a payroll advance, return to duty letters, a September 2, 2005 statement by Mr. Voigt and letters dated January 19 and 27, 2006 by Dr. Saba. The vast majority of these documents were previously submitted to the Office or were substantially similar to previously submitted documents. Some of the documents while new, such as Dr. Saba's letters, Mr. Voigt's September 2, 2005 statement, the appeals and decisions by the NLRB and EEO Commission, are not relevant. None of these documents address appellant's allegations of harassment, discrimination and being subjected to an unsafe workplace. His claims before the EEO Commission were dismissed and the settlement agreements contain no acknowledgement of fault. The issue before the NLRB involved the union's failure to represent appellant in a grievance. Whether or not the union failed to represent appellant in a grievance is irrelevant to appellant's allegations of harassment and discrimination by the employing establishment. Generally, union activities are not considered within the course of employment.[13] Thus, the Board finds that none of these documents are relevant to the merit

[11] *See L.H.*, 59 ECAB ___ (Docket No. 07-1191, issued December 10, 2007) (section 10.608(b) of Office regulations provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits).

[12] *Khambandith Vorapanya*, 50 ECAB 490 (1999); *John Polito*, 50 ECAB 347 (1999); *David J. McDonald*, 50 ECAB 185 (1998).

[13] *See generally Phyllis A. Sjoberg*, 57 ECAB 409 (2006) (the general rule is that union activities are personal in nature and not within the course of employment).

issue of this case, *i.e.*, whether appellant established a compensable factor of employment. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[14]

Appellant also submitted duplicate copies of statements by coworkers and management and reports by Dr. Saba, which were already of record and previously reviewed by the Office. The submission of evidence which repeats or duplicates evidence that is already in the case record does not constitute a basis for reopening a case for merit review.[15] The Board, therefore, finds that this evidence is insufficient to warrant reopening appellant's claim for further merit review.

Further, appellant submitted various reports from Ms. Avila-Pandey. However, the evidence from Ms. Avila-Pandey, a family therapist, is not competent medical evidence as she is not a physician under the Act.[16] Moreover, the underlying issue in this case is factual, *i.e.*, whether appellant established a compensable factor of employment, which her reports did not address. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[17] Thus, the reports by Ms. Avila-Pandey are insufficient to warrant reopening appellant's claim for further merit review.

The evidence submitted by appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or constitute relevant and pertinent new evidence not previously considered by the Office. As he did not meet any of the necessary regulatory requirements, the Board finds that she is not entitled to further merit review.[18]

CONCLUSION

The Board finds that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[14] *M.E.*, 58 ECAB ___ (Docket No. 07-1189, issued September 20, 2007).

[15] *Patricia G. Aiken*, 57 ECAB 441 (2006).

[16] *See David P. Sawchuk*, 57 ECAB 316 (2006); *James Robinson, Jr.*, 53 ECAB 417 (2002). Section 8101(2) provides that a physician includes, surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law.

[17] *M.E.*, *supra* note 14.

[18] *See* 20 C.F.R. § 10.608(b); *Richard Yadron*, 57 ECAB 207 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 18, 2007 is affirmed.

Issued: November 10, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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