United States Department of Labor
Employees' Compensation Appeals Board

P.M., Appellant	)	
and	)	**Docket No. 09-2189**
	)	**Issued: August 5, 2010**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, San Francisco, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 31, 2009 appellant filed a timely appeal from a March 25, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration. As the most recent merit decision is dated January 25, 2008, more than one year prior to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.[1]

ISSUE

The issue is whether the Office properly refused appellant's request to reopen his case for further review of the merits under 5 U.S.C. § 8128.

[1] An appeal of an Office decision must be filed within one year of the issuance of such decision for decisions issued prior to November 19, 2008; *see* 20 C.F.R. § 501.3(d)(2) or within 180 days of the issuance of such decision for decisions issued on or after November 19, 2008; *see* 20 C.F.R. § 501.3(e) (2008).

FACTUAL HISTORY

On April 6, 2007 appellant, then a 41-year-old clerk, filed a traumatic injury claim alleging that on March 24, 2007 he sustained stress, insomnia and headaches when he was "repeatedly accused of being caught drinking alcohol by coworkers and managers" on March 24, 2007. He stopped work on March 27, 2007.

In an accompanying statement, appellant related that on the morning of March 24, 2007 he drove his coworker, Ray Fernandez, to work. Mr. Fernandez had a history of problems with alcohol. Appellant parked his car across the street from the employing establishment, put a frozen water bottle in his pocket and gave another water bottle to Mr. Fernandez. When appellant went into work an acting supervisor, John Luk, told him that Thomas Hom, a manager, witnessed Mr. Fernandez and him outside drinking beer. Appellant informed Mr. Hom twice that he and Mr. Fernandez were drinking water but Mr. Hom responded that he saw them opening beer cans. He was upset about the accusation and feared disciplinary action. A supervisor and coworkers told appellant that they heard he was caught drinking beer. On March 26, 2007 appellant asked coworkers for statements confirming that he did not drink beer. Henry Moye, a manager, told Mr. Hom that appellant did not drink and was assisting Mr. Fernandez in his attempt to cure his alcoholism.

In a statement dated April 6, 2007, Mr. Hom related that he saw Mr. Fernandez, who had a history of drinking alcohol, open what appeared to be a beer can that appellant handed him from the trunk of his car, which was parked across the street from the employing establishment. He told Mr. Luk to watch Mr. Fernandez and "explained what I thought I saw." Mr. Hom did not accuse appellant of drinking. He stated that on April 2, 2007 he "verbally apologized for [his] bad assumption on March 24, 2007."

In a statement dated April 6, 2007, Mr. Luk related that on March 24, 2007 Mr. Hom told him to watch Mr. Fernandez because he may have been drinking. He indicated that Mr. Hom did not mention appellant or accuse him of drinking. Mr. Luk spoke with appellant because he knew that he drove Mr. Fernandez to work.

On April 10, 2007 the employing establishment controverted the claim. It noted that the manager did not accuse appellant directly of drinking but instead of handing a can of beer to Mr. Fernandez. The employing establishment stated:

> "It is apparent that [appellant] handed Ray Fernandez a frozen bottle of water, which looked like a white beer can from across the street. [Mr. Hom] asked his supervisor John Luk only to observe Ray Fernandez, who has a well-known drinking problem. However, the supervisor approached [appellant] (without his instructions) and asked him if he had been drinking outside. The incident apparently got twisted in the claimant's mind and he thought that the manager had questioned him about the drinking. At no time was the claimant accused of drinking on March 24, 2007 by the manager or Supervisor John Luk."

The employing establishment noted that it was appellant rather than management that told his coworkers about the alleged drinking.[2]

On May 15, 2007 appellant asserted that Mr. Luk signed a statement on April 6, 2007 that conflicted with his other signed version of events. He alleged that Mr. Hom "instructed Mr. Luk to sign this contradictory statement."

In a statement received May 18, 2007, Mr. Luk related that on March 24, 2007 Mr. Hom told him that appellant and Mr. Fernandez were drinking beer outside. Mr. Luk told Mr. Hom that appellant did not drink. Mr. Hom also inquired about his red skin and Mr. Luk informed him that he took medication for diabetes and high blood pressure.

By decision dated May 24, 2007, the Office denied appellant's emotional condition claim. It discussed his allegation that a manager, Mr. Hom, accused him and a coworker of drinking beer before work. The Office noted that the employing establishment subsequently determined that appellant was not drinking beer. It found, however, that Mr. Hom's discussion of his suspicion with other managers was an administrative matter. The Office further noted that Mr. Hom did not take any disciplinary action against him as he realized that he was incorrect. It concluded that appellant had not established any compensable factors of employment.

On June 3, 2007 appellant requested an oral hearing, which was held on October 23, 2007. His representative, Mr. Luk, Mr. Hom and Marybel Gonazales, a manager, testified at the hearing. Appellant's representative asserted that the employing establishment did not investigate him but instead accused him of drinking and spread the accusation as gossip. Appellant described the March 24, 2007 incident. He again noted that Mr. Luk's statement conflicted regarding whether Mr. Hom said that he and Mr. Fernandez or just Mr. Fernandez were outside drinking beer. Mr. Luk related that he could not remember why the statement he signed differed in that respect. Mr. Hom asserted that on March 24, 2007 he told Mr. Luk to watch Mr. Fernandez and see if he smelled alcohol. He did not tell Mr. Luk to speak with appellant. Mr. Hom told only managers about the suspected alcohol drinking but did not mention it any more.

In a decision dated January 25, 2008, the hearing representative affirmed the May 24, 2007 decision. He determined that the employing establishment was performing an administrative function when questioning appellant about possible wrongdoing and that there was no evidence that it acted unreasonably. The hearing representative also found that there was no evidence that Mr. Hom gossiped or spread rumors about appellant drinking alcohol. He noted that it was possible that appellant accidentally spread the rumor when he spoke to Mr. Hom about the matter. The hearing representative additionally found no evidence of harassment or discrimination and noted that his failure to obtain redress or a written apology from Mr. Hom was not a compensable work factor.

On January 21, 2009 appellant, through his representative, requested reconsideration. His representative argued that Mr. Hom's version of events was contradictory as he initially stated that he stopped repeating his suspicions about the alleged beer drinking once he was

[2] Appellant submitted numerous statements from coworkers supporting that he did not drink.

corrected and then admitted that he told others. Appellant's representative also noted that Mr. Luk provided conflicting statements and admitted that Mr. Hom pressured him into making false statements. He referred to a statement provided by Danny Fong, a coworker, as evidence of Mr. Hom's derogatory comments about appellant and noted that Mr. Hom told Marsha Walker, a coworker, not to say anything to EEO investigators. Appellant's representative concluded that Mr. Hom's actions were "dishonest and destructive."

Appellant resubmitted statements from his union representative, coworkers and supervisors dated 2007. He further submitted numerous investigative affidavits from witnesses in connection with his Equal Employment Opportunity (EEO) claim, including a January 31, 2008 affidavit from Ms. Gonzales, a February 3, 2008 affidavit from Mr. Hom, a February 12, 2008 affidavit from Ms. Walker, a February 12, 2008 affidavit from Danny Fong, a coworker, and an April 3, 2008 affidavit from Walter Pettus, a coworker. Ms. Walker related that Mr. Hom told her not to say anything to appellant about his workers' compensation case. Mr. Fong noted that after the hearing Mr. Hom indicated that he did not care if appellant was married to a "f…ing Chinese woman or a f…ing black woman." Mr. Pettus indicated that he saw Mr. Hom watch appellant get something from a cooler and noted that appellant had in the past handed him a beer from his car trunk. He warned appellant that Mr. Hom saw him get something from his trunk. Mr. Hom, in his affidavit, denied informing anyone that appellant was drinking beer. He noted that he told other managers of his suspicions but did not spread gossip.

On July 10, 2008 Mr. Luk related that he "felt pressure to sign a statement against [appellant]." In a statement dated September 30, 2008, Mr. Luk related:

> "It seems to me this was a small situation that has become a 'bigger situation' when the [employing establishment's] management conspired to a cover-up story against [appellant] April 6, 2007 at manager Thomas Hom's direction with manager Marybel Gonzales's approval in the tour office. I continued to object, but I finally gave [in] to the pressure of my managers and signed the false statement given to me by Mr. Hom that manipulated the facts against [appellant]. Since April 6, 2007 I feel this act and others has created a retaliatory, discriminatory and hostile environment by Mr. Hom."

In a decision without a hearing dated November 18, 2008, an EEO judge found that appellant did not establish harassment or a hostile work environment from being improperly accused of drinking alcohol or from workplace gossip. The judge noted that the employing establishment did not take any adverse action against him or action based on race or disability.

On January 9, 2009 appellant provided a statement relevant to his EEO claim and a statement listing the relevant events. In a statement dated January 28, 2009, he related that Mr. Hom's misconduct caused his work injury.

By decision dated March 25, 2009, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not new or pertinent and thus insufficient to warrant reopening the case for further merit review.[3]

On appeal appellant argues that he sustained an injury on March 24, 2007 when Mr. Hom spread rumors about him drinking. He described the events of March 24, 2007, noting that a manager and other coworkers told him that they heard the story that he was drinking beer. Appellant asserted that Mr. Hom asked about his red skin and that Mr. Luk acknowledged that he signed false documents typed by Mr. Hom. He noted that he was at work when the incident occurred. Appellant stated, "Management used my name and 'beer drinking' and then all conspired and said nobody used my name."

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[4] the Office's regulations 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.[5] 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.[6] 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 on the merits.[7]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[8] The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[9] While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[10]

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[3] The Office noted that in some statement appellant referred to incidents subsequent to the March 24, 2007 work injury and surrounding events. It advised him to file a new claim if he believed that he sustained an injury due to those work factors.

[4] 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application."

[5] 20 C.F.R. § 10.606(b)(2).

[6] *Id.* at § 10.607(a).

[7] *Id.* at § 10.608(b).

[8] *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

[9] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

[10] *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

ANALYSIS

The Office denied appellant's emotional condition claim after finding that he did not establish any compensable work factors. It determined that he did not establish either harassment or error or abuse by the employing establishment in an administrative function. Appellant did not attribute his emotional condition to the performance of his work duties. He maintained instead that he sustained a stress-related condition due to an accusation by management that he had been drinking before work on March 24, 2007 and actions taken by management in connection with the March 24, 2007 incident. In order to warrant reopening his case for further merit review, he must raise an argument or submit evidence relevant to the issue of whether the employing establishment harassed and discriminated against him[11] or committed error or abuse in administrative matters arising out of the March 24, 2007 incident.[12]

In his request for reconsideration, appellant's representative argued that Mr. Hom spread rumors that he was drinking beer and then denied his actions. Mr. Hom also forced Mr. Luk to provide conflicting statements and told Ms. Walker not to say anything to EEO investigators. The representative asserted that Mr. Hom's statement to Mr. Fong about appellant's wife showed that he was antagonistic toward appellant. The Office previously considered appellant's argument that Mr. Hom told others of his belief that appellant and Mr. Fernandez had been drinking beer and his contention that Mr. Hom continued to spread rumors about appellant after he said that he had dropped the matter. Evidence or argument which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[13]

Appellant contends that Mr. Hom told Mr. Luk that he was drinking outside of work and then coerced Mr. Luk into signing a statement that Mr. Hom did not state that appellant was drinking. In support of his contention, he submitted a September 30, 2008 statement from Mr. Luk, who related that management "conspired to a cover-up story against [appellant] April 6, 2007." Mr. Luk related that he yielded to pressure from management and signed a false statement that Mr. Hom provided "that manipulated the facts against [appellant]." He stated, "Since April 6, 2007 I feel this act and others has created a retaliatory, discriminatory and hostile environment by Mr. Hom." Mr. Luk, however, did not provide any specific information regarding what he signed that was false or adverse in any way to appellant. He further did not describe any specific discriminatory or hostile action taken against appellant by management. Consequently, Mr. Luk's statement is not relevant to establishing harassment or error or abuse by the employing establishment.

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[11] For harassment and discrimination to give rise to compensable disability, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions are not compensable. *See V.W.*, 58 ECAB 428 (2007); *Doretha M. Belnavis*, 57 ECAB 311 (2006).

[12] An administrative or personnel matter will be considered an employment factor only where the evidence discloses evidence of error or abuse by the employing establishment. *T.G.*, 58 ECAB 189 (2006); *Robert Breeden*, 57 ECAB 622 (2006).

[13] *C.N.*, 60 ECAB ___ (Docket No. 08-1569, issued December 9, 2008); *Elaine M. Borghini*, 57 ECAB 549 (2006).

Appellant's representative also argued that Mr. Hom told Ms. Walker not to talk to EEO investigators. He submitted a February 12, 2008 affidavit from Ms. Walker, who related that Mr. Hom told her not to say anything to appellant about his workers' compensation case. There is no evidence that Mr. Hom's instructions to Ms. Walker not to comment on appellant's case were erroneous or abusive and thus this evidence is not relevant to establishing a compensable work factor.

In a February 12, 2008 affidavit, Mr. Fong maintained that after the hearing Mr. Hom related that he did not care if appellant was married to a "f…ing Chinese woman or a f…ing black woman." In an April 3, 2008 affidavit Mr. Pettus indicated that he saw Mr. Hom watch appellant get something from a cooler and related that at one time prior appellant had given him a beer from his car trunk. Mr. Hom, in his affidavit, related that he told other managers about his suspicions of the beer drinking but did not gossip. These statements are not relevant to showing harassment or error or abuse in a factor identified by appellant as causing his emotional condition. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.[14]

With his request for reconsideration, appellant submitted evidence from 2007 already of record. Evidence which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[15]

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 submit new and relevant evidence not previously considered. As he did not meet any of the necessary regulatory requirements, he is not entitled to further merit review.

On appeal appellant argued that management accused him by name of drinking beer and then purposefully denied that he was accused. He also related that Mr. Hom gossiped about his belief that appellant was drinking and questioned his red skin. As discussed, however, the Office already considered these assertions and thus they do not warrant reopening the claim.

Appellant further maintained that he was at work when the incident occurred and thus sustained a work injury. In order to establish an emotional condition, however, a claimant must first establish a compensable work factor.[16]

CONCLUSION

The Board finds that the Office properly refused appellant's request to reopen his case for further review of the merits under 5 U.S.C. § 8128.

[14] *Johnny B. Causey*, 56 ECAB 359 (2006); *Freddie Mosley*, 54 ECAB 255 (2002).

[15] *See Elaine M. Borghini, supra* note 13.

[16] There are situations where an injury or illness occurs in the course of the employment and has some kind of causal connection with it but nevertheless is not covered because it is found not to have arisen out of the employment. *A.K.*, 58 ECAB 119 (2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 25, 2009 is affirmed.

Issued: August 5, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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