

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH A. KATZ PUESCHEL and DEPARTMENT OF
TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,
Leesburg, Va.

*Docket No. 96-1954; Submitted on the Record;
Issued July 13, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits on October 25, 1995 and March 4, 1996.

The Board has duly reviewed the case on appeal and finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits on March 4, 1996.

On April 5, 1994 appellant filed a notice of traumatic injury alleging that on that date she developed anxiety due to "the events of the day relating to my work scheduling. The [employing establishment] requiring me to change the schedule (present) contrary to my doctor's orders." On the reverse of the form, appellant's supervisor indicated with a checkmark "yes" that his knowledge of the facts agreed with appellant's. Appellant submitted medical evidence that she was required to maintain a stable work schedule. Appellant also submitted medical reports indicating that she developed anxiety following a discussion regarding a change in her work schedule. The Office requested additional factual and medical evidence from appellant. By decision dated December 8, 1994, the Office denied appellant's claim finding that the injury did not occur in the performance of duty.¹ The Office specifically found that appellant had not submitted sufficient evidence to establish that the employing establishment's decision to alter her work schedule constituted error or abuse in an administrative action. Appellant, through her attorney requested reconsideration on February 24 and December 7, 1995, the Office denied these requests by decisions dated October 25, 1995 and March 4, 1996, respectively.

¹ As this decision was issued more than one year prior to the date of appellant's appeal to the Board on June 5, 1996, the Board lacks jurisdiction to review this decision on appeal; *see* 20 C.F.R. § 301.3(d)(2).

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.² 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 review the merits of the claim.³

In support of her February 24, 1995 reconsideration request, appellant submitted a report dated December 19, 1994 from Dr. Stephen Rojcewicz, a Board-certified psychiatrist. Dr. Rojcewicz stated appellant developed further worsening of her symptoms on April 5, 1994 when she was told that she had to meet with the union and with supervisory officials to implement a change in her work schedule, to be effective within several weeks, that she believed to be contrary to medical recommendations. He noted that appellant concluded that this action was a deliberate retaliation for her previous claims and complaints. Dr. Rojcewicz stated appellant became highly agitated and had to leave work.

This report is not sufficient to require the Office to reopen appellant's claim for the merits as Dr. Rojcewicz's version of the events on April 5, 1994 indicates that appellant was informed that she was to have a meeting regarding a future change in her work schedule, not that such a meeting or such changes actually occurred, and that appellant believed the proposed change in her schedule was contrary to medical recommendations, not that the changes were in fact contrary to medical restrictions. As this report is not relevant to the reason the Office denied appellant's claim, the lack of factual evidence supporting error or abuse in the employing establishment actions in proposing to meet to change appellant's work schedule, it is not sufficient to require the Office to reopen appellant's claim for consideration of the merits.

Appellant also submitted her response to the Office's request for additional factual evidence. Appellant did not provide any additional information regarding the alleged employment incident, but instead referred the Office to her previous claim. As this statement did not provide any new evidence not in the record at the time of the Office's December 8, 1994 decision, it is not sufficient to require the Office to reopen appellant's claim for review of the merits of her claim.

Dr. Brian C. Turrisi, a Board-certified pulmonary specialist, completed three form reports providing a diagnosis and indicating that he felt that appellant's condition was causally related to her employment. These reports are not sufficient to require the Office to reopen appellant's claim as the evidence contained is not relevant to the factual issue for which appellant's claim was denied.

² 20 C.F.R. § 10.138(b)(1).

³ 20 C.F.R. § 10.138(b)(2).

In the December 7, 1995 reconsideration request,⁴ appellant asserted that on April 5, 1994, the employing establishment altered her work schedule without prior medical approval which caused a stress induced reaction. This argument had previously been considered by the Office and is therefore not sufficient to require the Office to reopen appellant's claim for consideration of the merits.

Appellant further alleged that on April 5, 1994 she learned that due to the schedule change she would be supervised by Lynn Becker, that this was the supervisor that the Office accepted had sexually harassed, retaliated and discriminated against appellant in her prior claim and that the prospect of supervision by Lynn Becker also contributed to her stress-related condition.

However, these allegations are not sufficient to require the Office to reopen appellant's claim for consideration of the merits as the record does not contain the necessary supportive facts granting the allegations reasonable color of validity. There is no evidence in the record on appeal addressing the basis for acceptance of appellant's prior claim for neurotic disorders and whether this claim involved actions by Lynn Becker. Appellant's allegation that she sustained an emotional condition because she would in the future be working under the supervision of Lynn Becker assuming arguendo that this would be related to her prior claim, does not constitute a compensable factor of employment under Board precedent.⁵ Therefore, appellant's request for reconsideration did not comply with the Office's regulations and it is insufficient to require the Office to reopen her claim for consideration of the merits.

⁴ This reconsideration request contains a statement that on December 7, 1995 a copy was sent by overnight delivery to the Office. The record does not contain a copy of the envelope or an Office date stamp. On the front of the reconsideration request is the handwritten note "received December 13." As the Office evaluated this request as timely, the Board will also consider it to be so.

⁵ *Dodge Osborne*, 44 ECAB 849, 856 (1993); *Paul A. Clarke*, 43 ECAB 940, 950 (1992).

The decisions of the Office of Workers' Compensation Programs dated March 4, 1996 and October 25, 1995 hereby affirmed.

Dated, Washington, D.C.
July 13, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member