U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARTEN J. MATOSIAN and DEPARTMENT OF THE AIR FORCE, VANDENBERG AIR FORCE BASE, CA

Docket No. 98-2138; Submitted on the Record;
Issued October 28, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for review of the merits pursuant to 5 U.S.C. § 8128.

The case has been before the Board on prior appeal. In a decision dated November 7, 1996,[1] the Board remanded the case for the Office to determine whether appellant was entitled to compensation benefits from May 20, 1991 to March 4, 1992 due to his February 6, 1989 employment injury. The Board further found that the Office should make findings of fact regarding the employment factors implicated by appellant in his claim for an emotional condition causally related to his federal employment. The history of the case and conclusions of law are contained in the Board's prior decision and are incorporated herein by reference.

By decision dated January 8, 1997, the Office determined that appellant was entitled to monetary compensation from May 21, 1991 to March 3, 1992 due to disability from his employment injury. The Office found that the weight of the evidence established that appellant had no further disability effective July 9, 1993 due to his February 6, 1989 employment injury. The Office further found that appellant had not established that he sustained an emotional condition in the performance of duty as he did not allege any compensable factors of employment.

By letter dated January 3, 1998, appellant, through his representative, requested reconsideration of the denial of his claim for an emotional condition arising in the performance of duty. By decision dated March 25, 1998, the Office denied the request for reconsideration on the grounds that the evidence submitted was immaterial, repetitious and cumulative and thus insufficient to warrant review of the prior decision.

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[1] Docket No. 96-218.

The Board finds that the Office abused its discretion by refusing to reopen appellant's case for review of the merits pursuant to 5 U.S.C. § 8128(a).

The only decision over which the Board has jurisdiction is the March 25, 1998 decision, which denied appellant's request for a review of the merits of the case. Because more than one year has elapsed between the issuance of the Office's decision dated January 8, 1997 and July 1, 1998, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the January 8, 1997 decision.[2]

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Federal Employees' Compensation Act. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and the specific issue(s) within the decision, which claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

"(i) Showing that the Office erroneously applied or interpreted a point of law, or

"(ii) Advancing a point of law or fact not previously considered by the Office, or

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[3]

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[4] Evidence that repeats or duplicates evidence already in the case record has no evidentiary values and does not constitute a basis for reopening a case.[5] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[6]

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence, which may be necessary to discharge her burden of proof.[7] The requirements pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[8] If the Office should determine that the new evidence submitted lacks substantive

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

[3] 20 C.F.R. § 10.138(b)(1).

[4] *See* 20 C.F.R. § 10.138(b)(2).

[5] *Daniel Deparini*, 44 ECAB 657 (1993).

[6] *Id.*

[7] *Helen E. Tschantz*, 39 ECAB 1382 (1988).

[8] *See* 20 C.F.R. § 10.138(b).

probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.[9]

In support of his request for reconsideration, appellant's representative argued that the employing establishment acted abusively toward appellant and further contended that a Merit Systems Protection Bureau (MSPB) judge acted improperly during a hearing on his MSPB claim. However, these arguments are essentially repetitious of those previously contained in the case record and considered by the Office. Appellant also submitted a substantial amount of evidence already contained in the case record, including statements made in a claim before the MSPB, correspondence between the Office and the employing establishment, personnel actions and a medical report dated April 1, 1992. Copies of evidence previously considered by the Office are repetitive in nature and, therefore, insufficient to warrant a merit review of the case.[10]

Appellant further submitted correspondence from the employing establishment concerning his back-related employment injury, a scheduled fitness-for-duty examination, a medical report regarding appellant's child and a stipulation of a coworkers' testimony before district court. The evidence submitted, however, is not relevant to the issue at hand, which is whether appellant sustained an emotional condition in the performance of duty. The Board has held that the submission of evidence which does not address the particular issue involved is of little probative value.[11]

Appellant also submitted excerpts from the Diagnostic and Statistical Manual of Mental Disorders[12] and copies of regulations from the Code of Federal Regulations (CFR). However, the Board has held that medical texts are of no evidentiary value in establishing causal relationship as such materials are of general application and are not determinative of whether the specific condition claimed is related to the particular employment factors alleged by the employee.[13] Similarly, the copies of CFR regulations regarding Equal Employment Opportunity (EEO) complaints are of general application and do not pertain to the main issue in the instant case.

Appellant additionally submitted copies of his EEO complaints of discrimination filed on May 9 and June 20, 1989, January 1, February 25 and March 27, 1991. However, the complaints do not corroborate appellant's allegations of error or abuse by the employing establishment and thus cannot provide a basis for reopening the record.

Appellant further submitted a statement dated May 27, 1987 from Mr. Martin Bayless, a former coworker. Mr. Bayless supported appellant's allegations of discrimination by indicating that he heard appellant's supervisor "constantly" using ethnic slurs in reference to appellant and

[9] *Dennis J. Lasanen*, 41 ECAB 933 (1990).

[10] *Eugene F. Butler*, 36 ECAB 393 (1984).

[11] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[12] 3d ed. rev., 1987.

[13] *William C. Bush*, 40 ECAB 1064 (1989).

related that the supervisor stated that he was "going to get [appellant]." The Board has held that the use of an epithet which is derogatory in nature can constitute harassment under the Act.[14] The statement of Mr. Bayless thus constitutes relevant and pertinent evidence not previously considered by the Office and is sufficient to require the Office to conduct a merit review of the case. In its March 25, 1998 decision, the Office found that the evidence submitted by appellant contained nothing "which would overturn the previous decision." However, the probative value of newly submitted evidence may be considered by the Office only after conducting a merit review of the case.[15] The issue, therefore, is not whether appellant has established a compensable factor of employment, but only whether the request for reconsideration is sufficient to require the Office to reopen the claim for review on the merits. The Board finds that the evidence accompanying the request for reconsideration is sufficient to require the Office to reopen the case for merit review.

In view of the foregoing, the case shall be remanded to the Office to issue a decision on the merits of the case.

The decision of the Office of Workers' Compensation Programs dated March 25, 1998 is reversed and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
October 28, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[14] *Abe E. Scott*, 45 ECAB 164 (1993),

[15] *Dennis J. Lasanen*, 41 ECAB 933 (1990).