

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of TYSON McRAE and DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION, Los Angeles, CA

*Docket No. 99-158; Submitted on the Record;  
Issued May 25, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration.

On July 5, 1996 appellant, then a 39-year-old airway transportation systems specialist filed a notice of traumatic injury and claim for compensation alleging that he was not granted a promotion for purely political reasons and was the victim of a general conspiracy involving harassment and unequal treatment which caused him to suffer undue stress and anxiety. The date of injury listed on the Form CA-1 was June 10, 1996.

The record indicates that on May 8, 1996 appellant was called into his supervisor's office and advised that he had not been selected for a promotion. On May 10, 1996 appellant was given a memorandum explaining why five persons had been selected for jobs while others, including appellant, had not been chosen. It is appellant's contention that he was misled into believing that if he passed up an opportunity to transfer jobs he would be given a job promotion. He has alleged an excessive work load and harsh treatment for having differences with coworkers.

In a letter dated August 5, 1997, the Office advised appellant that his traumatic injury claim was to be considered as an occupational disease claim since appellant had alleged events at work which occurred over a period of more than one work shift. Appellant was also advised of the type of evidence he was required to submit to establish his claim.<sup>1</sup>

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<sup>1</sup> Appellant disagreed with the Office's August 5, 1997 letter because he felt he underwent separate and distinct traumatic emotional incidents at work. Thus, he filed two additional traumatic injury claims on September 3, 1996 (File numbers A13119350 and A13119351) citing dates of injury on May 8 and 10, 1996. The Board considers appellant's claim to be one for an occupational disease. Appellant is not prejudiced by this designation. Since he did not file his traumatic injury claims within 30 days of the alleged employment incidents, he would not be entitled to continuation of pay based on a traumatic injury versus an occupational disease claim.

In a decision dated January 15, 1997, the Office denied appellant's claim on the grounds that he failed to establish that he sustained an emotional condition in the performance of duty.

In a decision dated May 9, 1997, an Office hearing representative affirmed the Office's January 15, 1997 decision.

In a letter, which is date stamped as received by the Office on May 7, 1998, appellant requested reconsideration. He submitted ten affidavits obtained during an investigation of an Equal Employment Opportunity (EEO) complaint, a copy of a letter of warning dated May 20, 1992 and medical records from the Sierra Urgent Care medical facility indicating that he was treated on October 6, 1993 for job stress and anxiety.

In a letter dated June 2, 1998, counsel for appellant requested an extension of time to review the case and filed a reconsideration request. Appellant's counsel subsequently filed a request for reconsideration on June 27, 1998 along with a copy of a declaration and correspondence signed by Deborah A. Dew, an EEO counselor.

In an August 5, 1998 decision, the Office denied appellant's request for further review, finding that the evidence submitted in support of appellant's request for reconsideration was immaterial in nature and insufficient to warrant review of the Office's May 9, 1997 decision.

The Board finds that the Office abused its discretion in denying further merit review pursuant to 5 U.S.C. § 8128.

The only decision before the Board on appeal is the August 5, 1998 Office decision which found that appellant, in his request for reconsideration, had not submitted sufficient evidence to warrant a merit review of the Office's January 15, 1997 decision. Since more than one year has elapsed between the January 15 and May 9, 1997 Office decisions and September 28, 1998, the date appellant filed his appeal before the Board, the Board lacks jurisdiction to review the January 15 and May 9, 1997 decisions.<sup>2</sup>

Section 8128(a) of the Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.<sup>3</sup> The regulations provide 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.<sup>4</sup> When 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 reviewing the merits of the claim.<sup>5</sup> Evidence that repeats or duplicates evidence already

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<sup>2</sup> 20 C.F.R. § 501.3(d) requires that an appeal must be filed within one year from the date of issuance of the final decision of the Office.

<sup>3</sup> 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>4</sup> 20 C.F.R. § 10.138(b)(1).

<sup>5</sup> 20 C.F.R. § 10.138(b)(2).

in the case record has no evidentiary value and does not constitute a basis for reopening a case.<sup>6</sup> Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.<sup>7</sup> Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.<sup>8</sup>

In the instant case, appellant's reconsideration request, which was received by the Office on May 7, 1998, was filed within one year of the May 9, 1997 Office decision. In addressing the standard of review to be applied to appellant's reconsideration request, the Office erroneously stated that appellant had the burden to establish clear evidence of error on behalf of the Office in denying his claim. That standard is applied only when a reconsideration request is not filed within one year of an Office final decision. The Board notes, however, that, although the Office misstated that appellant had to show clear evidence of error, the Office specifically denied appellant's request for merit review on the grounds that her evidence on reconsideration was not relevant.

Because appellant's reconsideration request was timely filed within the one year deadline provided at section 8128, appellant was only required to submit new and relevant evidence on reconsideration to obtain a merit review of his case. Contrary to the Office's finding, appellant's new evidence including affidavits from coworkers involved in an EEO investigation for harassment against appellant that is relevant to the issue of whether the employing establishment erred or acted abusively in denying appellant's promotion. It is well established that the requirement for reopening a claim for merit review does not require a claimant to submit all evidence which may be necessary to discharge his or her burden of proof.<sup>9</sup> The Board finds that the Office erroneously concluded that the affidavits submitted constituted hearsay and were not relevant to the issue on appeal. Consequently, because appellant submitted new and relevant evidence on reconsideration, on remand the Office should conduct a merit review on appellant's claim for compensation.

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<sup>6</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

<sup>7</sup> *Edward Matthew Diekemper*, 31 ECAB 224 (1979)

<sup>8</sup> *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

<sup>9</sup> *See Joseph L. Cabral*, 44 ECAB 152 (1992).

The decision of the Office of Workers' Compensation Programs on August 5, 1998 is hereby set aside and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, D.C.  
May 25, 2000

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member