

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD G. CONNOR and DEPARTMENT OF ENERGY,
Washington, DC

*Docket No. 00-823; Submitted on the Record;
Issued February 20, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

In March 1996, appellant filed a claim alleging that he sustained emotional and stress-related conditions due to various incidents and conditions at work. He alleged that a court ordered the employing establishment to place him in a GS-15 grade level position for which he applied, but that the employing establishment ignored the court's order. Appellant claimed that, after he returned from an absence, the employing establishment harassed him by placing his work space in a storage room. He alleged that, with a few exceptions, he was not given any meaningful assignments after he returned to work. Appellant indicated that his name was omitted from an organizational chart, which was distributed during a meeting with a deputy assistant secretary. He asserted that Brian Woodward, a supervisor, "hated my guts" and unfairly criticized his filing of a lawsuit by indicating that he was "hiding behind the judge's robes." Appellant claimed that he should have been given the work assignments, which were given to Mr. Woodward.

Appellant indicated that in December 1992 he overheard Finn Neilson, a supervisor, make a vulgar reference to him while speaking on the telephone. He claimed that Injak Paik, a supervisor, constantly "hounded" him and tried to ruin his reputation. Appellant indicated that Ms. Paik unfairly kept records of his whereabouts, wrote that he was late to work on the bulletin board, wrongly rejected documentation he submitted to justify his leave use, and spread a story that he was going to shoot his coworkers. He indicated that Carol Ott, a coworker, had testified that watching Ms. Paik's treatment of him was like "watching someone kick a puppy." Appellant alleged that the employing establishment did not give him a management position in

order to retaliate for his filing of an Equal Employment Opportunity (EEO) claim. He indicated that, during his lawsuit, documents were produced which contained a notation that he was not given a management position in order to retaliate for his filing of an EEO claim.

By decision dated January 9, 1997, the Office denied appellant's claim on the grounds that he did not establish any compensable employment factors. By decision dated April 3, 1998 and finalized April 4, 1998, an Office hearing representative affirmed the Office's January 9, 1997 decision. By decision dated September 30, 1999, the Office denied appellant's request for merit review.

The only decision before the Board on this appeal is the Office's September 30, 1999 decision denying appellant's request for a review on the merits of its April 3, 1998 decision. Because more than one year has elapsed between the issuance of the Office's April 3, 1998 decision and December 22, 1999, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the April 3, 1998 decision.¹

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² 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) submit relevant and pertinent new evidence not previously considered by the Office.³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.⁴ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁵

In support of his reconsideration request, appellant submitted a transcript of testimony presented by Ms. Ott in connection with a lawsuit filed in federal court. Ms. Ott testified that Ms. Paik stated appellant was "nuts" in response to a question about his mental health and that Ms. Paik required appellant to report his "every coming and going" but did not require other employees to do so. She testified that if appellant was late Ms. Paik would write on a chalkboard that he was "missing" or "absent without leave" but that she did write such comments for other people. Ms. Ott indicated that on one occasion Ms. Paik placed appellant on a speakerphone such that others could hear the conversation and then repeatedly asked him when he was coming to work in an abusive manner. She asserted that this treatment was cruel and "like poking a little puppy with a sharp stick."

¹ See 20 C.F.R. § 501.3(d)(2).

² 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[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 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b)(2).

⁴ 20 C.F.R. § 10.607(a).

⁵ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

Appellant also submitted a transcript of testimony presented by Mr. Woodward in connection with a federal lawsuit and an EEO complaint. Mr. Woodward testified that he did not assign appellant any work and that he tended to avoid him at work. He indicated that he told Mr. Nielsen, in reference to appellant's lawsuit, that appellant refused to come out from behind "the skirt of the judge's robes." Appellant also submitted a collection of notes, apparently made by employing establishment officials, which included the notation, "Management will not put him in a supervisory position in retaliation for bringing EEO complaints."⁶

The Board has reviewed the evidence submitted by appellant in support of his reconsideration request and notes that it bears sufficient relation to appellant's arguments regarding claimed employment factors to constitute relevant and pertinent new evidence not previously considered by the Office.⁷ Therefore, the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion. The case will be remanded to the Office for the performance of a merit review to be followed by an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated September 30, 1999 is set aside and the case remanded to the Office for proceedings consistent with this decision of the Board.

Dated, Washington, DC
February 20, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ The notes also contained comments regarding various matters, including the claims appellant made regarding the assignment of duties, the provision of work space, and the vulgar comment alleged to have been made by Mr. Neilson. The record also contains a copy of an employing establishment organizational chart.

⁷ Appellant had not previously submitted similar witness statements in support of his claim. He had alleged that harassment and discrimination on the part of his supervisors contributed to his claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors are established as occurring and arising from a claimant's performance of his regular duties, these could constitute employment factors. *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).