

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAWRENCE W. CREEL and DEPARTMENT OF THE ARMY,
MAIN POST EDUCATION CENTER, Fort Bragg, NC

*Docket No. 02-407; Submitted on the Record;
Issued July 26, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for merit review.

On March 9, 1998 appellant, then a 56-year-old education services specialist, filed an occupational disease claim alleging that his hypertension and stomach problems were due to job stress. Appellant explained that he had suffered severe stress because of the employing establishment's efforts to downsize the work force. He added that discrimination, harassment and a hostile work environment also caused his stress. Appellant stopped work on February 9, 1998 and retired on disability on March 31, 1998.

On January 29, 1999 the Office denied appellant's claim on the grounds that none of the work factors he alleged as causing his physical and mental problems constituted a compensable factor of employment. The Office determined that most of the alleged work incidents concerned administrative and managerial functions and appellant had presented no evidence of error or abuse on the part of the employing establishment.

Appellant requested an oral hearing, which was held on July 27, 1999. On November 18, 1999 the hearing representative denied appellant's claim on the grounds that none of his allegations constituted compensable factors of employment.

On June 1, 2000 appellant requested reconsideration on the grounds that his emotional injuries did arise out of the alleged incidents and submitted a copy of part of his supervisor's testimony in support of the March 6, 1998 incident. On October 16, 2000 the Office denied modification of its prior decision.

On September 24, 2001 appellant again requested reconsideration and submitted: (1) a summary of focus groups' findings which allegedly showed a continuing hostile working environment; (2) an Internal Review Report dated March 2, 2000 by the Criminal Investigation

Division which showed that education counselors were harassed and not treated equally; and (3) copies of testimony from two supervisors on April 25, 2001 before the Equal Employment Opportunity Commission (EEOC) that corroborated error and abuse by the employing establishment. Appellant argued that four of the incidents he alleged as contributing to his emotional condition were proven and that the hearing representative erred in finding to the contrary.

On November 6, 2001 the Office denied appellant's request on the grounds that the evidence submitted in support was cumulative and therefore insufficient to warrant merit review.

The Board finds that the Office acted within its discretion in refusing to conduct a merit review of appellant's claim

The only Office decision before the Board on appeal is dated November 6, 2001, denying appellant's request for reconsideration. Because more than one year has elapsed between the last merit decision dated October 16, 2000 and the filing of this appeal on January 2, 2002, the Board lacks jurisdiction to review the merits of appellant's claim.¹

Section 8128(a) of the Federal Employees' Compensation Act² vests the Office with discretionary authority to determine whether it will review an award for or against compensation.³

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).⁴ The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.⁵ Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.⁶

In this case, the hearing representative listed the 12 incidents that appellant alleged as the cause of his hypertension and stress at work. Of these, she found that four had not occurred as described by appellant, namely, that his supervisor yelled at him on June 30, 1997, that his

¹ 20 C.F.R. §§ 501.2(c); 501.3(d)(2). *See John Reese*, 49 ECAB 397, 399 (1998).

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8128(a) ("The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.").

⁴ 20 C.F.R. § 10.608(a) (1999).

⁵ 20 C.F.R. § 10.606(b)(1)-(2) (1999).

⁶ 20 C.F.R. § 10.608(b) (1999).

supervisor contravened the work instructions of appellant's physician, that his supervisor used a hostile tone on February 9, 1998 in reprimanding appellant and that his supervisor intimidated him on March 6, 1998. The hearing representative also found that eight other incidents concerned administrative actions and personnel matters that were not related to appellant's regular or specially assigned duties and were therefore not compensable work factors.

The hearing representative then reviewed the evidence and determined that none of it established error or abuse on the part of the employing establishment in dealing with appellant over the use of leave, scheduling of work shifts, questioning about his absences, performance appraisals, issuing of disciplinary letters and downsizing proposals.

On reconsideration appellant argued that the focus groups' findings substantiated the existence of a hostile working environment. The study generally detailed employees' perceived problems with management and offered specific solutions. It appears to have been conducted sometime in 2000 and did not address appellant's specific allegations at work prior to his retirement in March 1998. Therefore, this evidence is not relevant to the issue of establishing compensable work factors.

The internal review of the tuition assistance program found many irregularities and inadequacies and concluded that the program was not managed properly, resulting in excess tuition assistance of more than \$230,000.00. Appellant argues that this document shows that employees were harassed and mistreated. However, this document does not provide any names or specific incidents and therefore does not address the issue of whether appellant himself was the victim of harassment and mistreatment. Therefore, this document is not relevant to his specific allegations.

The testimony of two supervisors before the EEOC is similarly irrelevant to the issue of establishing compensable work factors.⁷ Contrary to appellant's contentions, the testimony does not discuss appellant's alleged incidents of managerial harassment. Supervisor Mary D. Ford testified that she left appellant's division in March 1997 and Supervisor John T. Wilson stated that appellant last worked with him in 1996. Mr. Wilson acknowledged that he had no personal knowledge of the March 6, 1998 incident. Therefore, their testimony is not relevant to the issue in this case.

Appellant argued that his supervisor's rude and hostile attitude on February 9, 1998 was documented by a tape recording he submitted. The hearing representative listened to this recording and found that it was not a recording of the telephone conversation between appellant and his supervisor, but rather a transcription of appellant's own recitation of what transpired on that day and his recollection of what was said. Thus, appellant's argument has already been considered.

Appellant has failed to show that the Office erred in interpreting a point of law regarding the necessity of establishing compensable work factors in an emotional condition claim, nor has he submitted any new relevant or pertinent evidence or advanced any relevant legal argument not

⁷ The outcome of appellant's complaint before the EEOC is not in the record.

previously considered by the Office.⁸ Inasmuch as appellant failed to meet any of the three requirements for reopening his claim for merit review, the Office properly denied his reconsideration request.⁹

The November 6, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
July 26, 2002

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ See *Thomas J. Engelhart*, 50 ECAB 322, 324 (1999).

⁹ See *Eugene L. Turchin*, 48 ECAB 391, 397 (1997).