

for bilateral knee strain. In her narrative statement submitted in support of her emotional condition claim, appellant discussed more than 33 separate incidents occurring between September 1992 and January 1998, which she alleged contributed to her emotional condition.

In support of her claim, appellant submitted form reports dated April 5 and May 16, 1996 from Dr. Tamara M. Fogerty, a Board-certified internist, who diagnosed stress reaction, took appellant off work for several days and then released her back to work. Appellant also submitted reports dated September 22, 1997 and April 20, 1999 from Dr. Phillip M. Carman, her treating licensed clinical psychologist, who diagnosed major depression but did not indicate the cause of this condition or state whether it was disabling.

At the request of the Office, the employing establishment submitted an April 28, 2000 statement from appellant's supervisor, Larry Rubin, controverting appellant's allegations.

In a decision dated May 4, 2000, the Office denied appellant's claim finding that she failed to establish that her claimed emotional condition occurred in the performance of duty.

Appellant requested an oral hearing, which was held on October 25, 2000 and submitted additional evidence in support of her claim, including an October 29, 2000 report from Dr. Carman who stated that he had treated appellant from April 25, 1996 through October 12, 1999, recounted the many employment incidents to which appellant attributed her condition, diagnosed major depressive disorder, single episode and post-traumatic stress disorder and stated that the diagnoses were causally related to cumulative stress experiences which occurred at work while appellant was in the performance of her official duties and responsibilities, primarily the hostile, unfair and insensitive treatment by Mr. Rubin. Dr. Carman concluded that appellant had been partially disabled for many years, with brief periods of total disability.

In a decision dated January 11, 2000, an Office hearing representative found that appellant had established five compensable factors of employment: on September 21, 1992 she was involved in a heated verbal altercation with clerk Sue Norga, regarding work issues; on March 10, 1995 she was involved in a verbal altercation with Monica Barycki, also regarding work issues; on certain days between February 26 and August 16, 1996, appellant was assigned to work the ZIP telephones alone, without assistance and that during the peak periods the telephones would ring once every three seconds; on April 23, 1996 Mr. Rubin erroneously refused to allow appellant to return to work, following an absence, without a detailed medical report from her physician; and the fact that the employing establishment was found to have erred in failing to pay appellant overtime when she worked on March 7, 2000 her day off. The hearing representative further found, however, that the medical evidence was insufficient to establish that appellant developed an emotional condition, causally related to these factors. The hearing representative stated that, while Dr. Carman had diagnosed an emotional condition and had cited to several compensable employment factors, he had not explained how those factors caused or contributed to appellant's diagnosed psychiatric condition, for which he treated her from April 25, 1996 through October 12, 1999. While the hearing representative found Dr. Carman's opinion to be insufficient to establish appellant's claim, he found that the report was nonetheless adequate to require further medical development by the Office. The hearing representative remanded the case to the Office with instructions to prepare a detailed statement of accepted facts, listing separately those factors that were employment related versus those that were not

employment related and those which had not been established as factual. The hearing representative then instructed the Office to direct appellant to obtain and submit the Office notes concerning the treatment she received with Dr. Carman from April 25, 1996 through October 12, 1999, as well as the records from the psychiatrist or psychologist she began seeing after October 12, 1999. Thereafter, the Office was instructed to undertake further development as deemed appropriate and issue a *de novo* decision.

By letter dated January 24, 2001, the Office asked appellant to submit Dr. Carman's treatment notes dating from April 25, 1996 through October 12, 1999, as well as the records from the psychiatrist or psychologist she began seeing after October 12, 1999.

In response, appellant submitted a February 9, 2001 report from Dr. Carl S. Wells, a licensed clinical psychologist, who stated that he had seen appellant for approximately 20 sessions between November 1, 1999 and November 13, 2000, when she left to see another therapist. Dr. Wells diagnosed depressive disorder, but did not discuss the cause of appellant's condition.

Appellant also submitted a report dated March 8, 2001 from Dr. Carman, in which he discussed several of the compensable factors identified by the hearing representative, namely the confrontations with Ms. Norga and Ms. Barycki, appellant's having worked the ZIP telephones on February 26, 1996, and not being allowed to return to work on April 23, 1996. The physician stated that the two confrontations as well as a February 26, 1996 confrontation she had with Mr. Rubin over the ZIP telephone duties were prepotent and so overpowering that they had a very significant effect on appellant, sensitizing her and making her vulnerable to other upsetting incidents. With respect to not being allowed to return to work on April 23, 1996, Dr. Carman stated that this event was also dramatic and traumatic and led to her becoming afraid and confused and further sensitized her for future unpleasantness. The physician concluded that these accepted factors of employment were the root cause of appellant's industrial illness, causing her to become seriously depressed and develop post-traumatic stress disorder.

By letter dated April 20, 2001, the Office requested that appellant submit the actual treatment notes from Drs. Carman and Wells. In response, appellant submitted the requested treatment notes from Dr. Wells dating from January 3, 1999 to November 13, 2000. By letters sent directly to the physicians dated May 29, 2001, the Office requested that Dr. Carman and Dr. Arnold P. Nerenberg, appellant's new treating licensed clinical psychologist, submit their treatment notes.

In a decision dated July 2, 2001, the Office denied appellant's claim for an employment-related emotional condition, finding that no response to the April 20 or May 29, 2001, requests had been received from Dr. Nerenberg, Dr. Carman or appellant and that, therefore, the medical evidence was insufficient to establish a causal relationship between the accepted employment factors and appellant's diagnosed emotional condition. The Office did not discuss Dr. Carman's March 8, 2001 report.

By letter dated July 30, 2001 and postmarked August 2, 2001, appellant requested examination of the written record by an Office hearing representative and submitted treatment notes from Dr. Nerenberg dating from May 29, 2001. In addition, appellant submitted a

duplicate copy of Dr. Carman's October 29, 2000 report, asserting that the physician had adequately addressed the accepted compensable factors of employment.

In a decision dated September 29, 2001, the Office denied appellant's request for a review of the written record on the grounds that it was not timely filed and the issues in her claim could be addressed through reconsideration. On October 25, 2001 appellant requested reconsideration and submitted an August 16, 2001 report from Dr. Nerenberg, in support of her request. He stated that appellant had been traumatized by the confrontations with her coworkers and her supervisor, by her excessive telephone duty, by not being allowed to return to work, by being denied overtime pay and by being forced to work outside of her restrictions. The physician concluded that he agreed with Dr. Carman that appellant's diagnosed post-traumatic stress disorder and major depression were totally caused by her work at the employing establishment.

In a decision dated November 13, 2001, the Office found the newly submitted evidence to be insufficient to warrant modification of the Office's prior decision, noting that neither Dr. Carman's nor Dr. Nerenberg's treatment notes had been submitted as requested.

By letter dated December 14, 2001, appellant again requested reconsideration and resubmitted Dr. Nerenberg's treatment notes in support of her request. In a decision dated March 15, 2002, the Office found the newly submitted evidence insufficient to warrant modification of the prior decision, noting that the treatment notes of Dr. Carman, dating from April 25, 1996 to October 12, 1999, had not been submitted as requested.

By letter dated March 1, 2003, appellant requested reconsideration of the Office's prior decision and submitted additional evidence in support of her request. In a decision dated June 3, 2003, the Office denied appellant's request for reconsideration on the grounds that the request neither raised substantive legal questions nor included new and relevant evidence and, therefore, was insufficient to warrant review of the prior decision.

LEGAL PRECEDENT

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.¹ Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.²

¹ 20 C.F.R. § 10.606(b)(2) (1999).

² 20 C.F.R. § 10.608(b) (1999).

ANALYSIS

The only decision before the Board in this appeal is that dated June 3, 2003, in which the Office denied appellant's application for merit review. As more than one year had elapsed between the date of the Office's most recent merit decision dated March 15, 2002 and the filing of appellant's appeal postmarked November 5, 2003 and received on November 13, 2003 the Board lacks jurisdiction to review the merits of appellant's claim.³

In her letter requesting reconsideration, appellant asserted that Dr. Carman had fully addressed the causal relationship between her emotional condition and the compensable factors of employment in his reports dated October 29, 2000 and March 8, 2001. In addition, appellant raised several new incidents, occurring between March 24, 1997 and March 6, 2002, which she alleged further contributed to her stress condition. However, appellant did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

In support of her March 1, 2003 request for reconsideration, appellant submitted duplicate copies of medical reports from Dr. Wells and Dr. Carman, which were previously considered by the Office, as well as an August 21, 1997 fitness-for-duty report from Dr. Hassan A. Monaghegh, also previously of record. The Board has held that evidence that repeats or duplicates evidence already in the case record does not constitute a basis for reopening a claim for merit review.⁴

Appellant also submitted copies of email correspondence between herself and the employing establishment dating between March 26 and June 3, 2002, a limited-duty roster for the period August 26, 2000 to March 16, 2002, a February 4, 2000 letter to her congressman, a July 8, 2001 letter to the union regarding a grievance she had filed, a bid assignment dated January 27, 2001 and a job assignment dated January 5, 2000. While these documents are new to the record, as they pertain to events which occurred subsequent to the filing of her claim, they are not relevant to the issue of whether her work stoppage on April 22, 1999 was due to an employment-related emotional condition.⁵

Appellant also submitted new medical evidence from Dr. Nerenberg, including a May 9, 2002 form report finding appellant "totally disabled at this time" and a May 20, 2002 note releasing appellant back to work. However, as Dr. Nerenberg did not provide any opinion regarding appellant's condition in 1999, when she stopped work and filed her claim, these

³ 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed. Section 501.2 provides that the Board's review of a case shall be limited to the evidence in the case record, which was before the Office at the time of its final decision. The Board is unable to consider evidence for the first time on appeal; *see Marlene K. Cline*, 43 ECAB 580 (1992).

⁴ *James R. Bell*, 52 ECAB 414 (2001).

⁵ *Kevin M. Fatzner*, 51 ECAB 407 (2000).

reports are not relevant to the main issue of the present case and, therefore, are insufficient to warrant reopening appellant's claim for further review of the merits.⁶

Appellant did, however, submit new and relevant documentary evidence, not previously considered. As discussed above, in a decision dated January 11, 2000, an Office hearing representative discussed the numerous allegations raised by the claimant and determined that she had only established five compensable factors of employment. In so finding the Office hearing representative specifically stated that with respect to appellant's assertion that after she applied for and was selected on September 10, 1997 for the position of general clerk in the AMS office, the employing establishment abolished the position and appellant was made an unassigned regular on September 15, 1997. As this was an administrative matter and appellant had not provided any evidence of error or abuse on the part of the employing establishment, she had not established this factor as compensable. The Board notes that on reconsideration, appellant submitted a copy of a grievance settlement dated February 16, 2002, which finds that the employing establishment violated the National Agreement by including in the announcement of the general clerk position that the position would be abolished if there was a successful bidder. As appellant has submitted the evidence of agency error or abuse, which was previously lacking and as this evidence pertains directly to the issues in this case appellant met the requirements for requesting reconsideration under 20 C.F.R. § 10.606(b)(2)(iii).⁷ The Board finds that the February 16, 2002 grievance award is sufficient to require reopening appellant's case for further review on its merits. As the Office failed to review this new evidence, which is relevant to the issue in this case it improperly denied appellant's request for further merit review. The June 3, 2003 decision will be set aside and the case remanded for consideration of all of the medical and documentary evidence contained in the record.

CONCLUSION

The Board finds with respect to the Office's June 3, 2003 decision denying reconsideration, that the Office improperly refused to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

⁶ *Id.*

⁷ See *Claudio Vazquez*, 52 ECAB 496 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 3, 2003 is set aside and the case is remanded for further action in accordance with this decision of the Board.

Issued: April 14, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member