United States Department of Labor
Employees' Compensation Appeals Board

MARLENE J. McDONALD, Appellant	)	
and	)	**Docket No. 04-519**
	)	**Issued: May 6, 2004**
DEPARTMENT OF THE NAVY,	)	
Port Hueneme, CA, Employer	)	

Appearances:
Marlene J. McDonald, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On December 15, 2003 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated September 9, 2003 which denied her request for reconsideration. Because more than one year has elapsed between the last merit decision, the Office's July 2, 2002 decision, and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). The only decision the Board has jurisdiction to review is the September 9, 2003 nonmerit denial of reconsideration.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 10, 2000 appellant, then a 63-year-old travel/transportation assistant, filed a claim attributing the development of an emotional condition on or about August 21, 2000 to

factors of her federal employment.[1] She advised that she was "off work October 10 through October 20, 2000 due to cervical pain caused by new job duties.... Further aggravated by deliberate work stress caused by coworkers radio, speaker, and telephone use, and harassment. Caustic, hostile remarks in English and Tagalong all day. Age and Caucasian minority discrimination." Appellant stopped work on October 10, 2000 and retired from the employing establishment on March 30, 2001.

In a decision dated January 14, 2002, the Office denied appellant's claim on the basis that she failed to establish that she sustained an injury in the performance of duty.

On February 11, 2002 appellant requested a review of the written record before an Office representative. By decision dated July 2, 2002, the Office hearing representative affirmed the January 14, 2002 decision denying compensation. The Office hearing representative found that, while appellant had made allegations against her supervisors, there was no evidence to support that management had harassed her. The Office hearing representative noted that appellant had complained to management about the use of loud radios at work and found that management had taken care of the problem. The Office hearing representative noted that a supervisor had the inherent right to supervise an employee, issue instructions and criticize an employee's performance when necessary and found that this included a supervisor's authority to control the workroom environment and to determine whether playing music at work would be allowed and, if so, the volume. The Office hearing representative concluded that the employing establishment had not committed any error or abuse in that administrative or personnel action. The Office hearing representative also found that no evidence had been submitted to support appellant's allegation that she was subject to harassment and discrimination at work, including age and racial discrimination. As appellant had not identified any compensable factors of employment, the Office hearing representative noted that a review of the medical evidence was not necessary.

In a June 20, 2003 letter, which the Office received on July 1, 2003, appellant requested reconsideration of the July 2, 2002 Office decision. In a four-page argument for reconsideration, appellant asserted that the Office's hearing representative's decision was not "fair or accurate" because her medical records were never requested or reviewed; "an outside investigation was never generated or performed;" and "the CA-2 with supporting documentation [that she] submitted [was] unmistakable." Appellant further inquired why the district Office did not "thoroughly investigate" the facts that she submitted and obtained "confidential" witness statements. Medical notes from St. John's Pleasant Valley Hospital were also submitted.

By decision dated September 9, 2003, the Office denied appellant's application for review finding that the evidence was repetitious, irrelevant or immaterial to the issue of whether appellant had established any compensable factors of employment for the condition for which she claims compensation.

[1] Although appellant originally referred to August 22, 2000 as the date she first became aware that her condition was caused or aggravated by her employment, she later noted the date to be August 21, 2000 in a claim filed March 20, 2001.

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) constituting relevant and pertinent new evidence not previously considered by the Office.[2] Section 10.608(b) provides that when an application for review of the merits of a claim 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.[3] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[4]

ANALYSIS

The Office denied appellant's request for reconsideration in a September 9, 2003 decision without conducting a merit review. It found that the evidence submitted was repetitious, irrelevant or immaterial to the issue of whether she had established any compensable factors of employment for the condition for which compensation was claimed.[5] In the June 20, 2003 reconsideration request, appellant set forth several arguments. She first asserted that the Office hearing representative's decision was not "fair or accurate" because her medical records were never requested or reviewed. In this case, appellant is claiming compensation for an emotional condition. The Board has found that unless a claimant establishes a compensable factor of employment, it is not necessary to address the medical evidence of record.[6] As the Office hearing representative found that appellant did not establish any compensable employment factors, the medical evidence of record did not need to be reviewed as it was not relevant to the disposition of her claim.

In arguing that her medical records were never requested, appellant asserted that the Kaiser Permanente's Insurance Office never received a request by the Office to obtain any of the medical records in connection with her claim. The Office procedure manual provides, in

[2] 20 C.F.R. § 10.606(b)(2) (1999).

[3] 20 C.F.R. § 10.608(b) (1999).

[4] *Annette Louise*, 54 ECAB ___ (Docket No. 03-335, issued August 26, 2003).

[5] To establish that she sustained an emotional condition causally related to factors of her federal employment, appellant must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to her condition; (2) rationalized medical evidence establishing that she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that her emotional condition is causally related to the identified compensable employment factors. *See Leslie C. Moore*, 52 ECAB 132 (2000); *Kathleen D. Walker*, 42 ECAB 603 (1991). Unless a claimant establishes a compensable factor of employment, it is not necessary to address the medical evidence of record. *Roger Williams*, 52 ECAB 468 (2001); *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

[6] *See Roger Williams, id.*

pertinent part, that "The CE [claims examiner] should request medical evidence which is in possession of federal medical officers or hospitals, or which is maintained by a doctor who attended the claimant through authorization by the Office. The claimant is responsible for obtaining the medical reports in all other situations."[7] Therefore, appellant, not the Office, was required to provide the medical evidence from the Kaiser Permanente medical group as it was a nonfederal medical provider.

Appellant alleged that "an outside investigation was never generated or performed" and stated that only occasional feeble attempts were made by management to end the daily harassment and abuses she experienced. She asserted that at no time did either agency refer her to any organization for support, such as the Equal Employment Opportunity Commission (EEOC) or an arbitrator. For harassment to give rise to a compensable disability under the Federal Employees' Compensation Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[8] The Office hearing representative found that appellant failed to submit evidence, such as statements from witnesses or a finding or harassment/discrimination by an arbitrator or the EEOC to support her allegations that she encountered harassment or discrimination at work, specifically age or racial discrimination. Appellant must establish a factual basis for her claim with probative and reliable evidence and the Office hearing representative found that she failed to do so in this case. There is no evidence that the Office hearing representative erroneously applied or interpreted a specific point of law. Appellant's statements that she became frustrated over the employing establishment's action to "end the daily harassment and abuses she suffered" and that she was not directed to other organizations for support, fail to show that the Office erroneously applied or misinterpreted a specific point of law.

Appellant alleged that the Office should have obtained "confidential witness" statements. Once an employee has made a *prima facie* case, the Office has the responsibility to take the next step, either of notifying the employee that additional evidence is needed to fully establish the claim, or of developing evidence in order to reach a decision on the employee's entitlement to compensation.[9] The Office's procedural manual provides, in pertinent part, that: "Statements from witnesses are not required in the same way as affidavits from the claimant and employing establishment; a claim may be approved in the absence of witness statements. They are useful, however, when the employing establishment is unable to confirm or refute the claimant's allegations."[10] A limited review of the record in this case reflects that the employing establishment refuted appellant's allegations. Appellant's contention failed to show that the Office erroneously applied or interpreted a point of law or advanced a point of law or fact not previously considered by the Office.

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[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development of Claims*, Chapter 2.800.6(d) (April 1993).

[8] *James E. Norris*, 52 ECAB 93 (2000); *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[9] *See Linda L. Newbrough*, 52 ECAB 323 (2001).

[10] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development of Claims*, Chapter 2.800.6(c) (April 1993).

The Board has held that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[11] Appellant submitted medical notes from St. John's Pleasant Valley Hospital. These medical notes, although new, are irrelevant to the issue at hand as they fail to establish that appellant sustained a compensable work factor in the performance of her federal employment. Accordingly, appellant is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2).

Appellant has not established that the Office improperly refused to reopen her claim for a review on the merits of its July 2, 2002 decision under section 8128(a) of the Act, because she did not show that the Office erroneously applied or interpreted a specific point of law, advanced a relevant legal argument not previously considered by the Office, or submitted relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the September 9, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 6, 2004
Washington, DC

Alec J. Koromilas
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[11] *See James E. Norris, supra* note 8.