

hearing representative properly denied her requests for subpoenas.¹ The facts are accurately set forth in the Board's decision and are incorporated herein by reference.

By letter dated December 30, 2003 and received by the Office on January 13, 2004, appellant requested reconsideration. Appellant submitted a copy of an October 9, 2003 final agency decision of the Equal Employment Opportunity (EEO) Commission which found that she was subjected to unlawful employment discrimination. The EEO Commission found that the employing establishment discriminated against appellant when it rescinded her 1997 bid for a mark-up clerk position after they determined that she was not medically qualified for the position. The EEO Commission further found that the employing establishment discriminated against appellant when its physician violated the Rehabilitation Act's prohibition against the release of confidential medical information. The agency noted that the employing establishment's physician, in addition to describing appellant's restrictions, told appellant's immediate supervisor that she "has a history of rheumatic heart disease with valvular involvement for which she received prophylactic medication," and indicated that she "has mild depression that is appropriately being treated with medication." The EEO Commission found that there was no exception to the confidentiality provisions of the Rehabilitation Act which permitted the release of an individual's medical diagnosis to a supervisor under those circumstances. The employing establishment was directed to offer appellant the mark-up clerk position and provide her with reasonable accommodation within ten calendar days after the decision became final; provide appellant with the appropriate amount of back pay; provide at least eight hours of EEO training to management; and consider taking disciplinary action against the employee identified as being responsible for the discrimination. Also submitted was a copy of the EEO Commission's denial of the employing establishment's request for reconsideration and a February 5, 2004 job offer from the employing establishment which, pursuant to the EEO Commission's directives, reoffered appellant the position of CFS clerk, which she had previously applied for in November 1997.

By decision dated March 31, 2004, the Office denied appellant's request for reconsideration finding that the evidence submitted did not constitute new and material evidence sufficient to permit a reopening of her claim.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128 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) constitute relevant and pertinent new evidence not previously considered by the Office.³ 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

¹ Docket No. 02-1449 (issued March 24, 2003).

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)(1)-(2).

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.⁴ When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the regulatory standards to the claimant's application for reconsideration and any evidence submitted in support thereof.⁵

ANALYSIS

As stated above, this case has been before the Board previously. The evidence submitted subsequent to the Board's March 24, 2003 decision consists of a final agency decision dated October 9, 2003 by the EEO Commission on a harassment/discrimination complaint filed by appellant on December 31, 1997, the EEO Commission's denial of the employing establishment's request for reconsideration, and a February 5, 2004 job offer, which the employing establishment issued pursuant to the directives set forth in the EEO Commission's decisions.

The Board notes that findings of other administrative agencies are not determinative with regard to proceedings under the Act, which is administered by the Office and the Board.⁶ However, as noted above, to reopen a claim for reconsideration, new evidence need only be relevant and pertinent and not previously considered by the Office.⁷ The Board finds that the October 9, 2003 EEO Commission decision is relevant new evidence as it lends support to appellant's claim that she sustained an emotional condition while in the performance of duty as the EEO Commission made findings of discrimination with regards to the employing establishment's rescission of a bid for a November 1997 mark-up clerk position and the release of confidential medical information by the employing establishment's physician to appellant's immediate supervisor. This is relevant because appellant, in her emotional condition claim, had alleged discrimination when the employing establishment advised her in 1997 to apply for disability or to retire as they were no longer able to accommodate her heart condition and were unable to locate a permanent light-duty position to accommodate her heart condition. Consequently, the October 9, 2003 EEO Commission decision is new and relevant evidence sufficient to warrant a merit review.

The Board, therefore, finds that appellant's request for reconsideration contains relevant and pertinent new evidence not previously considered by the Office and, thus, meets the third standard for obtaining a merit review of his case. Consequently, the Office should have reopened the case for a review on the merits.

⁴ 20 C.F.R. § 10.608(b) (1999).

⁵ *Annette Louise*, 54 ECAB ___ (Docket No. 03-335, issued August 26, 2003).

⁶ *George A. Johnson*, 43 ECAB 712 (1992).

⁷ *Supra* note 3. See also *Helen E. Tschantz*, 39 ECAB 1382 (1988) (the requirement for reopening a claim for a merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof; instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office).

CONCLUSION

The Board finds that the Office improperly denied a reopening of appellant's case for a review of the merits.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 31, 2004 is reversed and the case is remanded for further action consistent with this decision.

Issued: November 15, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member