# United States Department of Labor
# Employees' Compensation Appeals Board

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| **RANDY D. EPPS, Appellant** | ) | |
| **and** | ) | **Docket No. 05-1555** |
| | ) | **Issued: December 13, 2005** |
| **DEPARTMENT OF DEFENSE, VANDENBERG AIR COMMISSARY, VANDENBERG AIR FORCE BASE, CA, Employer** | ) | |

*Appearances:*
*Randy D. Epps, pro se*
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On July 20, 2005 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated August 25, 2004, which denied his emotional condition claim and nonmerit decisions dated December 30, 2004 and April 8 and July 6, 2005 which denied his requests for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit decisions.

### ***ISSUES***

The issues are: (1) whether appellant has established that he sustained an emotional condition while in the performance of duty; and (2) whether the Office properly refused to reopen appellant's claim for a further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

## ***FACTUAL HISTORY***

On May 20, 2003 appellant, a 45-year-old commissary officer, filed an occupational disease claim alleging post-traumatic stress disorder with the date of injury noted as June 15, 2000. He first became aware the condition was employment related on May 2, 2003. Appellant alleged his post-traumatic stress disorder was aggravated by his supervisor's harassment and precluded him from performing his duties.

On June 30, 2003 the Office received evidence from appellant in response to its request and a statement from Robert L. Varela, appellant's supervisor. The evidence submitted by appellant consisted of copies of emails, a copy of a civilian performance plan for appellant, a June 3, 2003 memorandum from Mr. Varela regarding appellant's occupational disease claim, a summary of the days Mr. Varela spent in each commissary store for 2000 to 2003, a May 24, 2003 statement by appellant, a May 23, 2003 report by Dr. Rand C. Ritchie, a treating Board-certified psychiatrist, a request for sick leave for the period May 16 to June 5, 2003 dated May 16, 2003 and a May 23, 2003 email responding to his supervisor's proposed suspension.

In the January 25, 2003 email to Thomas E. Milks, deputy director, appellant discussed Mr. Varela's recent treatment of him. Appellant noted that Mr. Varela "has called me several times and told me that my store was a problem store and needed a lot of work" without ever visiting the store or checking it out. He contended that "[a]ll this negative aggression on Mr. Varela's part only came about after the commissary customer service surveys (CCSS) scores were sent out." Appellant noted that he had previously been commended by Mr. Varela on his management of the store. He also alleged that Mr. Varela infrequently visited his store "because he didn't have any concerns/problems with our store." Appellant noted that he had been informed that Mr. Varela "had received a complaint from a [s]ales [r]epresentative about our [g]rocery [m]anager, Willie Belton, not treating her professionally." Appellant related the sales representative had not informed him of her complaint and defended Mr. Belton. Appellant stated that the "CCSS scores are inflated" and noted that since the surveys were in pencil they were easy to change.

In a March 1, 2003 email to Mr. Milks, Mr. Varela noted the February 27, 2003 email from Bill Turpin regarding feedback on the Vandenburg store managed by appellant. Mr. Varela stated, "[a]s you can see from Bill Vick[']s report there are serious concerns at Vandenberg Air Force Base which have been gradually becoming worse as a result of [appellant']s increasing distractions because of personal issues." Mr. Varela noted that a formal administrative action was probable and that his discussions with appellant have not had the desired effect. He noted that appellant would be returning from extended leave at the end of March 2003 and that Jackie Deaser could recommend appropriate action to pursue at the time appellant returned to work.

The record also contains emails dated April 30 to May 13, 2003 between appellant and Mr. Varela. The April 30 and May 1, 2003 emails regard the status of a store manager position and the May 12 and 13, 2003 emails concern reducing the number of items stocked at the Mini-com and the assignment of CAO positions at stores. Appellant proposed to reduce the number and Mr. Varela instructed him not to.

In a May 9, 2003 email to Mr. Milks, appellant alleged harassment and reprisal by Mr. Varela. He noted that Mr. Varela "started his abusive and aggressive behavior after I replied to an email from Mr. Page about the CCSS scores and told him that the scores were inflated by employees." Appellant noted that Mr. Varela gave him a Performance Improvement Plan (PIP), but did not have the supporting documentation when appellant asked for it. After waiting for Mr. Varela to fax the supporting documentation, appellant's secretary brought the information to him. Appellant contended that, due to the sensitivity of the issue, Mr. Varela should have hand carried this information to him.

In a May 23, 2003 report, Dr. Ritchie indicated that he had treated appellant since June 15, 2000 for post-traumatic stress disorder. He indicated that appellant was temporarily totally disabled due to an exacerbation of his condition which appellant attributed to "the drop in his performance evaluation from outstanding to needing a performance improvement evaluation." Dr. Ritchie stated that appellant believed "that this was done in retribution for filing an EEO complaint."

In a May 23, 2003 email, appellant replied to the notice of proposed suspension. Appellant contended that the proposed suspension was not valid and was "another way for Mr. Varela to get back at me because I contacted you due to the harassment and because I filed an EEO complaint." He alleged that Mr. Varela had backdated the performance plan and that he was given a mid-point review on the same day he was given a July 1, 2002 to June 30, 2003 performance plan.

In a statement dated May 24, 2003, appellant attributed his condition to a number of events involving his supervisor. He alleged that in January 2003 he emailed Mr. Page, regional director, apologizing for the CCSS scores at his store and included the comment that he "believed the CCSS scores were inflated because some employees were changing the answers." Mr. Varela called appellant shortly thereafter allegedly telling appellant that he "should not have sent those emails because it sounded like the stores in his [z]one were changing the answers to the survey questions." Appellant noted that he sent an email to Mr. Milks on January 28, 2003 regarding three harassing telephone calls he received from Mr. Varela telling him that Vandenberg was a problem store. Appellant alleged that Mr. Varela came to his office on January 29, 2003 and informed him of being angry with appellant regarding his emails to Mr. Page. Appellant also alleged that Mr. Varela made a threat by stating that "'one of us has got to change, or one of us has got to go!'" Appellant filed an EEO complaint on April 4, 2003 alleging reprisal and discrimination based on race and age. On April 9, 2003 appellant received a performance plan appraisal for the period July 1, 2002 to June 30, 2003 and that Mr. Varela "backdated the performance plan to August 14, 2002." Appellant was placed on a PIP by Mr. Varela on May 6, 2003, which he contends was unjustifiable. Appellant was also given a letter of reprimand on May 6, 2003 which he alleged "had no basis." Appellant alleged that since filing an EEO complaint and complaining to Mr. Varela's supervisor, "Mr. Varela is visiting Vandenberg more often" and looking for anything to use to criticize him. On May 23, 2003 appellant noted receipt of Mr. Varela's proposal to suspend him. Appellant contended that his post-traumatic stress disorder had worsened and that he was seeing a psychiatrist more often as a result.

In a June 3, 2003 statement, Mr. Varela denied that he was aware of appellant's post-traumatic stress disorder until May 23, 2003. With regard to his actions towards appellant, Mr. Varela stated:

> "I found it necessary to begin the documentation process, then proceed with administrative action because of [appellant]'s repeated failures to heed my verbal guidance, work with me to address and resolve operational concerns, follow my direct orders and to follow written directives and procedures regarding the storing of funds. It is unfortunate that appellant is claiming that he has experienced medical concerns as a result of my efforts to address shortfalls. The nature of the Store Director position and related duties can be challenging and stressful at times."

In a June 10, 2003 letter, Mr. Varela denied appellant's allegations of harassment. Mr. Varela contended that the administrative actions he took were not in reprisal for appellant's comments regarding the CCSS scores, emailing Mr. Milks or to appellant's EEO complaint. Mr. Varela contended that the administrative actions were taken as a result of appellant's performance as store manager and problems encountered at the Vandenberg Air Force Base commissary.

On August 25, 2003 the Office received an August 13, 2003 report by Dr. Stephen W. Hosea, a treating Board-certified internist, and a July 25, 2003 report and July 30, 2003 disability slip by Dr. Ritchie.

Dr. Hosea noted that he was treating appellant for post-traumatic stress and "complications related to HIV [human immunodeficiency virus] infection." He noted that, due to the medications appellant takes for HIV, he experienced chronic fatigue, asthenia, exhaustion, muscle weakness and atrophy. Dr. Hosea opined that "[t]his interferes with his ability to carry out his assigned duties as a store director." Dr. Ritchie noted appellant had "recently been suspended for going over his supervisor's head" and opined that appellant's post-traumatic stress disorder could be impairing his judgment.

In an August 25, 2003 report, Dr. Ritchie noted the history of appellant's post-traumatic stress disorder and that appellant took 30 days off in February 2003 after his wife gave birth to twins. Dr. Ritchie noted that appellant "had been feeling increasing[ly] stressed at work" and felt that his supervisor Mr. Varela was discriminating against him. He noted that appellant "began to have conflict with Mr. Varela when he refused to inflate the customer survey ratings." Upon appellant's return to work "Mr. Varela became increasingly critical of [appellant] and began to micromanage him." Dr. Ritchie noted that appellant filed an EEO complaint against Mr. Varela in May 2003 "due to the increased work stress," which "led to increased nightmares and flashbacks." He indicated that appellant's post-traumatic stress symptoms had increased significantly in May 2003 and appellant attributed this to a reprimand by Mr. Varela.

By decision dated November 20, 2003, the Office denied appellant's claim on the grounds that the evidence of record failed to demonstrate that the claimed injury occurred in the performance of duty.

On December 18, 2003 the Office received additional factual information including copies of emails regarding appellant's PIP, a decision to withhold his within-grade increase and evidence relating to his suspension for failing to follow a direct order and appellant's grievances regarding the suspension.

On December 22, 2003 the Office received appellant's December 4, 2003 request for review of the written record by an Office hearing representative.

In an April 2, 2004 decision, an Office hearing representative affirmed the denial of appellant's claim. The hearing representative found that all of the factors alleged by appellant fell within the administrative category and the record was devoid of evidence of error or abuse.

Appellant requested reconsideration on April 9, 2004 and submitted various emails, a May 5, 2003 memorandum reprimanding him for failing to follow a direct order by Mr. Varela, a copy of his May 23, 2003 discrimination complaint, copies of the Commissary Store Director's performance plan, a summary of Mr. Varela's visits to the commissary stores for 2000 to 2003, a statement regarding his reprimand, performance ratings of appellant for the periods July 1, 2001 to June 30, 2002, July 1, 1999 to June 30, 2000, a May 16, 2003 sick leave request, medical reports dated May 23 and August 25, 2003 by Dr. Ritchie, and clinic notes by Dr. Hosea.

By decision dated April 27, 2004, the Office denied modification. The Office failed to establish a compensable employment factor of the April 2, 2004 decision.

In a letter dated May 12 2004, received by the Office on May 20, 2004, appellant requested reconsideration and submitted a May12, 2004 statement and a May 13, 2004 report by Dr. Ritchie, who opined that appellant had an exacerbation of his post-traumatic stress disorder which he attributed to stress from Mr. Varela.

On August 4, 2004 the Office received the employing establishment's response to appellant's request for reconsideration, a copy of the civilian performance plan, a May 5, 2003 memorandum reprimanding appellant for failing to follow a direct order regarding the storing of funds and leave slips for June 16 and July 7, 2003.

Appellant submitted an August 15, 2004 statement by Paige Zuniga, a secretary, regarding Mr. Varela back dating appellant's performance plan; an August 15, 2002 statement by Mr. Belton regarding inappropriate comments made by Mr. Varela about appellant; a copy of the signature page for the civilian performance plan, the May 5, 2003 reprimand memorandum, a February 2003 DeCa newsletter; a January 25, 2003 email from appellant to Mr. Milks; an August 3, 2003 email concerning the EEO complaint against his supervisor; an August 16, 2004 statement by appellant's wife; a May 2, 2003 email regarding continued harassment by Mr. Varela; May 1, 2003 emails between appellant and Mr. Varela regarding the store manager position; a May 17, 2003 email regarding commissary support from Colonel Susanne P. LeClere to Mr. Page complimenting appellant's management of the Vandenberg commissary; leave slips dated May 16 and June 16, 2003; and a September 17, 2004 letter regarding the investigation of appellant's discrimination complaint.

By decision dated August 25, 2004, the Office denied modification of the April 27, 2004 decision.

Subsequent to denial of his claim, the Office received copies of materials previously submitted to the record. On December 20, 2004 the Office received appellant's reconsideration request. Appellant submitted a sworn affidavit dated September 1, 2004 by Mr. Varela in his EEO case. Mr. Varela first became aware of appellant's EEO complaint on April 8, 2003 and noted that the complaint was still in process. Mr. Varela stated that he was unaware of appellant's HIV status and he did not regard appellant as substantially limited at the time. Mr. Varela noted that he assigned Mr. Turpin and Mr. Vick to manage appellant's store while appellant was on leave from February 7 to April 8, 2003. With regard to the performance plan, Mr. Varela stated that it was not back dated and that he provided appellant with a signed copy as appellant said he did not have a copy. The May 23, 2003 proposed suspension letter was issued due to appellant's failure to follow a direct order. With regards to the PIP, Mr. Varela stated that appellant was placed on the PIP because of low stock availability, not following the DeCa promotion program and for failing to comply with directives regarding administrative functions by the employing establishment. As to the May 6, 2003 letter of reprimand, Mr. Varela stated that it had been issued due to appellant's failure to follow a direct order and to $900.00 missing from the cashbox Ms. Zuniga kept. Appellant repaid the amount out of his own money and "asked Mr. Franco to keep track of the money." Mr. Varela denied discriminating against appellant or forcing him to retire in January 2004.

In a December 30, 2004[1] nonmerit decision, the Office denied appellant's request for reconsideration, finding that the evidence submitted was duplicative of evidence already considered.

Appellant requested reconsideration on January 5, 2005 and submitted copies of emails dated February 27 and March 24, 2003 and an affidavit by Ms. Zuniga, a September 24, 2004 statement by Mr. Belton, who observed Mr. Varela treating appellant differently after the CCSS scores came out. Mr. Belton believed his performance appraisal was downgraded "on direction from Mr. Varela because of my involvement in [appellant]'s EEO complaint."

In an April 8, 2005 nonmerit decision, the Office denied appellant's request for reconsideration, finding that the evidence submitted was duplicative of that previously considered.

On April 19, 2005 the Office received evidence from appellant including various emails, a September 1, 2003 affidavit by Mr. Varela and a September 21, 2004 affidavit by appellant for his EEO complaint and treatment notes for the period June 15 to March 29, 2005 by Dr. Ritchie. On April 22, 2005 the Office received appellant's undated reconsideration request.

On May 19, 2005 the Office received medical reports for the period June 15, 2000 to March 29, 2005 by Dr. Ritchie detailing his treatment of appellant.

In a July 6, 2005 nonmerit decision, the Office denied appellant's request for reconsideration, finding that the evidence submitted was duplicative of that previously considered.

[1] The Board notes the record contains a duplicate cover letter dated December 31, 2004 with a received date of December 30, 2004.

## ***LEGAL PRECEDENT -- ISSUE 1***

To establish a claim of an emotional condition in the performance of duty, a claimant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.[2]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,[3] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[4] There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.[5] When an employee experiences emotional stress in carrying out his employment duties, and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from an emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.[6] On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.[7]

When working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[8]

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[2] *Leslie C. Moore*, 52 ECAB 132 (2000).

[3] 28 ECAB 125 (1976).

[4] 5 U.S.C. §§ 8101-8193.

[5] *See Robert W. Johns*, 51 ECAB 137 (1999).

[6] *Lillian Cutler*, *supra* note 3.

[7] *Kim Nguyen*, 53 ECAB 127 (2001).

[8] *Dennis J. Balogh*, 52 ECAB 232 (2001).

As a general rule, an employee's emotional reaction to administrative or personnel actions taken by the employing establishment is not covered because such matters pertain to procedures and requirements of the employer and are not directly related to the work required of the employee.[9] An administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.[10] An employee's frustration from not being permitted to work in a particular environment or to hold a particular position is not compensable.[11] Similarly, an employee's dissatisfaction with perceived poor management is not compensable under the Act.[12]

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. Rather, the issue is whether the claimant under the Act has submitted sufficient evidence to establish a factual basis for the claim by supporting his allegations with probative and reliable evidence.[13]

## ***ANALYSIS -- ISSUE 1***

Appellant alleged that he sustained an aggravation of his preexisting post-traumatic stress disorder as a result of harassment and reprisal by Mr. Varela, a poor performance evaluation and being placed on a performance improvement plan. A claimant must establish a factual basis for allegations that the claimed emotional condition was caused by factors of employment.[14] The Board finds that appellant has failed to establish that these administrative actions constitute compensable factors of employment.

The term harassment as applied by the Board is not the equivalent of harassment as defined or implemented by other agencies, such as the EEO Commission, which is charged with statutory authority to investigate and evaluate such matters in the workplace. Rather, in evaluating claims for workers' compensation under the Act, the term harassment is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by co-employees or workers. Mere perceptions and feelings of harassment will not support an award of compensation.[15] A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.[16] While appellant submitted statements by

[9] *Felix Flecha*, 52 ECAB 268 (2001).

[10] *Kim Nguyen*, 53 ECAB 127 (2001).

[11] *Barbara J. Latham*, 53 ECAB 316 (2002).

[12] *Id.*

[13] *James E. Norris*, 52 ECAB 93 (2000).

[14] *Katherine A. Berg*, 54 ECAB ____ (Docket No. 02-2096, issued December 23, 2002).

[15] *Beverly R. Jones*, 55 ECAB ____ (Docket No. 03-1210, issued March 26, 2004).

[16] *Penelope C. Owens*, 54 ECAB ____ (Docket No. 03-1078, issued July 7, 2003).

Ms. Zuniga and Mr. Belton, the Board finds this evidence is not probative as both employees provided general statements and did not provide specific descriptions of incidents or dates upon which these alleged incidents occurred. These statements and emails are not sufficient to establish any instances alleged by appellant or to establish that Mr. Varela harassed or discriminated against him.[17]

Mere perceptions of harassment or discrimination are not compensable under the Act, and unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for allegations with probative and reliable evidence.[18] In the case at hand, the Board finds that appellant's allegations do not rise to a level to establish harassment, rather they constitute his own perception of events and are insufficient to establish his claim for an employment-related emotional condition.[19] Appellant has not established a factual basis for his perceptions of reprisal or harassment by his supervisor beginning in January 25, 2003 as he provided insufficient probative evidence to establish that harassment and/or reprisal occurred.[20] The Board finds that appellant did not establish a compensable employment factor with respect to harassment and reprisal.[21]

Appellant alleged that the employing establishment improperly issued a letter of reprimand on May 6, 2003, that his placement on a PIP on May 6, 2003 was unjustifiable, that Mr. Varela backdated the performance plan for the period July 1, 2002 to June 30, 2003 to August 14, 2002 and began to visit the Vandenberg Commissary more often. Although the handling of disciplinary actions, the assignment of work duties and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer rather than regular or specially assigned work duties of the employee.[22] The monitoring of an employee's work by a supervisor relates to administrative or personnel matters unrelated to the employees' regular or specially assigned work duties. Such actions do not fall within the coverage of the Act unless the evidence establishes error or abuse by employing establishment personnel.[23] The Board finds no such error or abuse by Mr. Varela in monitoring appellant's work, *i.e.*, the survey results from the patrons affected the efficiency and effectiveness of the store, and taking actions to improve appellant's performance based on the survey results, seem reasonable under the circumstances presented. Appellant has not submitted evidence to corroborate his assertions that Mr. Varela acted abusively. The fact that appellant may take issue with Mr. Varela's management style, without more by way of showing error or abuse, is

[17] *See Charles D. Edwards*, 55 ECAB ____ (Docket No. 02-1956, issued January 15, 2004).

[18] *James E. Norris*, *supra* note 13.

[19] *See Barbara J. Latham*, *supra* note 11.

[20] *James E. Norris*, *supra* note 13.

[21] *See Jamel A. White*, 54 ECAB ____ (Docket No. 02-1559, issued December 10, 2002).

[22] *Charles D. Edwards*, 55 ECAB ___ (Docket No. 02-1956, issued January 15, 2004); *Cyndia R. Harrill*, 55 ECAB ___ (Docket No. 04-399, issued May 7, 2004).

[23] *Judy L. Kahn*, 53 ECAB 321 (2002).

insufficient to establish a compensable factor of employment.[24] Appellant has not established a compensable employment factor under the Act.

Regarding the letter of warning and other disciplinary matters, absent a showing of error or abuse, disciplinary matters generally fall outside the scope of coverage under the Act.[25] Although the handling of leave requests and attendance matters are generally related to the employment, they are administrative functions of the employer and not duties of the employee, and absent error or abuse are not compensable employment factors.[26] In this case, there is insufficient evidence to establish that the employing establishment erred in these disciplinary matters. The employing establishment provided ample explanations regarding these disciplinary matters.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and therefore has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.[27]

## ***LEGAL PRECEDENT -- ISSUE 2***

Section 8128(a) of the Federal Employees' Compensation Act[28] vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Act does not entitle a claimant to a review of an Office decision as a matter of right.[29]

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide 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.[30] 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.[31] When reviewing an

[24] *See Donney T. Drennon-Gala,* 56 ECAB ___ (Docket No. 04-2190, issued April 26, 2005).

[25] *Bobbie D. Daly*, 53 ECAB 691 (2002).

[26] *Judy L. Kahn, supra* note 23.

[27] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. *See Lori A. Facey*, 55 ECAB ___ (Docket No. 03-2015, issued January 6, 2004); *Margaret S. Krzycki*, 43 ECAB 496, 503-04 (1992).

[28] 5 U.S.C. § 8128(a) ("[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

[29] *Jeffrey M. Sagrecy*, 55 ECAB ___ (Docket No. 04-1189, issued September 28, 2004); *Veletta C. Coleman*, 48 ECAB 367 (1997).

[30] 20 C.F.R. § 10.606(b)(2).

[31] 20 C.F.R. § 10.608(b).

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.[32]

## ***ANALYSIS -- ISSUE 2***

Appellant's three requests for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not 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 requirements under section 10.606(b)(2).[33]

With respect to the third requirement, constituting relevant and pertinent new evidence not previously considered by the Office, appellant submitted duplicative copies of factual and medical evidence which was previously of record. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening the case.[34] The medical records for the period June 15, 2000 to March 29, 2005 by Dr. Ritchie, although new evidence, are not relevant to the underlying issue of whether appellant has established compensable employment factors. As appellant did not submit any relevant and pertinent new evidence, he is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).[35]

## ***CONCLUSION***

The Board finds that appellant did not meet his burden of proof to establish that she sustained an emotional condition in the performance of duty and properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

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

[33] 20 C.F.R. § 10.608(b)(2)(i) and (ii).

[34] *Denis M. Dupor*, 51 ECAB 482 (2000).

[35] 20 C.F.R. § 10.608(b)(2)(iii).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated July 6 and April 8, 2005, and December 30 and August 25, 2004 are affirmed.

Issued: December 13, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board