

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

JOHN R. CONROY, Appellant

and

**DEPARTMENT OF THE AIR FORCE, AIR
FORCE MATERIEL COMMAND, HILL AIR
FORCE BASE, UT, Employer**

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**Docket No. 05-1831
Issued: December 21, 2005**

Appearances:
John R. Conroy, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 6, 2005 appellant filed a timely appeal from a December 7, 2004 decision of the Office of Workers' Compensation Programs denying his request for a merit review and a May 20, 2005 decision denying his request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the denial of appellant's requests for reconsideration and a hearing.¹

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for a merit review; and (2) whether the Office properly denied appellant's request for a hearing.

¹ As more than one year passed between the Office's July 15, 2004 merit decision and the filing of this appeal, the Board does not have jurisdiction over the merits of the case.

FACTUAL HISTORY

On September 24, 2003 appellant, then a 47-year-old sheet metal mechanic, filed an occupational disease claiming that he sustained an emotional condition in the performance of duty on or before November 26, 1996.² Appellant attributed his condition to performance appraisals by supervisor Ray Armenta in October 1995 and April 1996, being held absent without leave (AWOL) for 45 minutes on June 19, 1996 for leaving the aircraft for 15 to 20 minutes to get supplies and being paged frequently over the intercom on June 29, 1996 by Mr. Armenta whenever appellant left the aircraft to get supplies. Appellant also alleged that on June 20, 1996 in the men's bathroom, Mr. Armenta stood on a toilet in the stall adjoining appellant's and looked into the stall to see what appellant was doing. He asserted that Mr. Armenta then spread rumors about the incident, leading to embarrassing gossip and humiliation by coworkers. Appellant alleged that, after the bathroom incident, graffiti of a man peering over a wall appeared on tool lockers, with words or captions denoting that the cartoon referred to Mr. Armenta looking at appellant in the bathroom.³ He stopped work on approximately November 9, 2003 and did not return.

In support of his claim, appellant submitted a March 29, 2004 letter from coworker Dale Tracy and an undated letter from coworker Ernie Magana, corroborating appellant's account of a June 1996 argument with Mr. Armenta after returning from the bathroom and subsequent rumors and graffiti regarding the incident. The employing establishment submitted a June 7, 2004 statement indicating that Mr. Armenta was not available for comment and that appellant's current supervisor had no knowledge of the alleged incidents.

Appellant submitted medical evidence from Dr. D. Paul Barney, an attending family practitioner, who diagnosed anxiety and situational stress on December 24, 1997. In December 15 and 22, 1997 chart notes, Dr. Enrico Leopardi, an employing establishment physician, stated that appellant appeared depressed. Dr. Loren Lewis, an employing establishment physician, recommended appellant's transfer to another unit on March 7, 2003 and held him off work beginning November 10, 2003. In an August 14, 2003 report, Dr. Steven L. Methner, an attending Board-certified psychiatrist and neurologist, diagnosed improving major depressive disorder and panic disorder attributable to a history of negative interactions with

² In a March 15, 2004 letter, the Office described the type of additional evidence needed to establish appellant's claim, including factual evidence corroborating the alleged employment incidents.

³ Appellant also described a denial of a requested transfer but did not attribute the claimed emotional condition to this incident.

supervisors and coworkers. In an October 20, 2003 slip, Dr. Duane Banks, an attending Board-certified psychiatrist, recommended that appellant be placed on light duty and removed from his current work site.⁴

By decision dated July 15, 2004, the Office denied appellant's emotional condition claim on the grounds that he failed to establish any compensable factors of employment. The Office accepted as factual but not compensable that appellant received low performance appraisals in October 1995 and April 1996, that Mr. Armenta held appellant AWOL on June 19, 1996, that Mr. Armenta paged appellant frequently on June 29, 1996 and that Mr. Armenta gave appellant an oral admonishment on August 29, 1996. The Office found that these were administrative incidents not within the performance of appellant's duties and that no error or abuse was shown. The Office also accepted as factual that, on June 20, 1996, Mr. Armenta looked over the bathroom stall wall to see what appellant was doing and accused appellant of sleeping. The Office found that this was a "conduct" or disciplinary issue not within the performance of duty and that no error or abuse was shown. The Office further found that appellant had not established as factual that Mr. Armenta spread rumors regarding the bathroom incident.

In a September 8, 2004 letter, appellant requested reconsideration. He asserted that the Office mischaracterized the June 20, 1996 bathroom incident as a disciplinary issue and contended that Mr. Armenta's actions established error and abuse. Appellant also reiterated his account of alleged incidents of embarrassment and humiliation stemming from the bathroom episode. In support of his request, appellant submitted an April 29, 2004 report, by Dr. Banks agreeing with Dr. Methner's August 14, 2003 assessment that appellant was "medically disabled from returning to work" at the employing establishment. He also submitted copies of his statements and medical evidence previously of record.⁵

By decision dated December 7, 2004, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support thereof was cumulative or repetitious. The Office found that the Office had fully considered the alleged bathroom incident and subsequent instances of harassment or embarrassment in its July 15, 2004 decision. The Office further found that appellant's arguments were insufficient to establish that the identified incidents were compensable factors of his employment. The Office noted that, as appellant had not established any compensable employment factor, the additional medical evidence submitted was irrelevant.

⁴ Appellant also submitted December 21, 1997, November 8, 2003, January 21 and March 31, 2004 reports from J. Manuel de la Torre, a social worker. However, the reports of a social worker or other nonphysician do not have probative value concerning medical matters and their opinions are not considered to be medical evidence. *Arnold A. Alley*, 44 ECAB 912. He also submitted a November 25, 2002 note from a chiropractor regarding a neck injury. This report does not mention the diagnosis of a spinal subluxation by x-ray. However, 5 U.S.C. § 8101(2) of the Act provides that the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. Appellant also submitted a December 27, 1997 dispensary slip signed by a physician whose signature is illegible. As the author of the form cannot be positively identified, the dispensary slip cannot be considered medical evidence in this case. *Merton J. Sills*, 39 ECAB 572, 575 (1988).

⁵ Appellant also submitted an August 18, 2004 report from Mr. de la Torre.

On December 16, 2004 appellant requested an oral hearing. He submitted June 9, 2004 reports from Dr. Darren Don, an employing establishment physician, sending appellant home pending administrative action. Appellant also submitted a form noting his retirement from the employing establishment effective April 1, 2005.

By decision dated May 20, 2005, the Office denied appellant's request for a hearing on the grounds that he had previously requested reconsideration. The Office further denied the hearing on the grounds that, after consideration of his request, it was determined that the issues involved could be addressed equally well "by requesting reconsideration from the ... [O]ffice and submitting evidence not previously considered which establishe[d] that [his] emotional condition was caused by work duties."

LEGAL PRECEDENT -- ISSUE 1

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.⁶ 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.⁷ 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.⁸

ANALYSIS -- ISSUE 1

The Office denied appellant's emotional condition claim by July 15, 2004 decision, finding that he had not established any compensable factor of employment. Appellant requested reconsideration in a September 8, 2004 letter. He asserted that the Office mischaracterized the June 20, 1996 bathroom incident as a disciplinary matter and reiterated his accounts of rumors and graffiti following the incident. Appellant also submitted an April 29, 2004 from Dr. Banks, an attending Board-certified psychiatrist as well as evidence previously of record.

Regarding appellant's September 8, 2004 letter, supporting statement and the copies of medical evidence 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.⁹ Appellant has not established a compensable factor of employment, medical evidence

⁶ 20 C.F.R. § 10.606(b)(2) (2003).

⁷ 20 C.F.R. § 10.608(b) (2003).

⁸ *Annette Louise*, 54 ECAB ____ (Docket No. 03-335, issued August 26, 2003).

⁹ *Denis M. Dupor*, 51 ECAB 482 (2000); *Howard A. Williams*, 45 ECAB 853 (1994); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

is not relevant to the claim. Regarding Dr. Banks' April 29, 2004 report, the Board notes that, while this is new evidence to the records, it is irrelevant to the issue of whether appellant established a compensable factor and is insufficient to warrant a merit review of the case.¹⁰ The Office properly denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹¹ Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.¹² The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.¹³

ANALYSIS -- ISSUE 2

On December 16, 2004 appellant requested an oral hearing pursuant to the Office's July 15, 2004 decision denying his emotional condition claim. However, he had previously requested reconsideration on September 8, 2004. Therefore, under section 8124(b)(1) of the Act, he was not entitled to a hearing as a matter of right.

The Office then exercised its discretion and determined that appellant's reconsideration request could equally well be addressed by requesting reconsideration and submitting additional evidence establishing that the claimed emotional condition was due to work factors. The Board finds that there is no evidence of record that the Office abused its discretion in denying appellant's hearing request. The Board finds that the Office's denial of appellant's request for an oral hearing was proper under the law and the facts of this case.

CONCLUSION

The Board finds that the Office properly denied appellant's request for a merit review. The Board further finds that the Office properly denied appellant's request for a hearing.

¹⁰ *Mark H. Dever*, 53 ECAB 710 (2002).

¹¹ 5 U.S.C. § 8124(b)(1).

¹² 20 C.F.R. §§ 10.616, 10.617.

¹³ *Claudio Vasquez*, 52 ECAB 496 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 20, 2005 and December 7, 2004 are affirmed.

Issued: December 21, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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