



## **FACTUAL HISTORY**

This case was previously on appeal before the Board.<sup>1</sup> In a decision dated March 15, 2002, the Board found that the case was not in posture for decision with regard to whether appellant sustained an emotional condition in the performance of duty. The Board noted that the Office, in its April 20, 2001 decision, denied appellant's claim on the basis that implicated factors were not compensable or factors that could be compensable had not been verified. The Board determined that the Office had not addressed all of the relevant evidence submitted prior to the issuance of its April 20, 2001 decision and remanded the claim for further review. The facts of the case, as set forth in the prior decision, are incorporated by reference.

The Office developed the claim and reviewed the relevant evidence. In a decision dated July 25, 2002, the Office denied appellant's claim finding the evidence was insufficient to establish that she sustained an emotional condition in the performance of duty. The Office found that certain incidents occurred, but were not considered to arise in the performance of duty. They included that appellant was called into Mr. Ford's office on February 23, 2001 for potential disciplinary action; that she was asked to provide medical documentation to support her contention that she could not wear a necktie as the initial evidence she submitted was not sufficient to support her claim that she could not wear a necktie. Appellant was ordered to work on her nonscheduled day off on February 27, 2001 and was threatened with disciplinary action if she did not do so. The Office accepted that Mr. Ford addressed an incident regarding appellant eating a bagel on the workroom floor on February 1, 2001.

Appellant requested reconsideration on September 6, 2002 and submitted additional evidence.

By decision dated December 6, 2002, the Office modified the July 25, 2002 decision. The Office found a compensable factor with regard to the officer in charge, Mr. Ford, retaliating against appellant for filing a grievance over performing bargaining unit work. However, the Office found that the medical evidence was insufficient to establish a causal relationship between appellant's diagnosed condition and the compensable employment factor.

Appellant requested reconsideration on January 16, 2003 and submitted additional evidence, including a January 5, 2003 report, in which Dr. Emily Nolfo, Board-certified in internal medicine, opined that appellant's "stress and anxiety" were "temporally connected with the presence of this supervisor in her workplace." She explained that she had no doubt that appellant's "situation at her work is causing her significant stress and anxiety."

By decision dated April 22, 2003, the Office denied modification of the December 6, 2002 decision.

Appellant requested reconsideration on July 19, 2003 and submitted additional evidence. In a June 19, 2003 report, Dr. Nolfo explained that she was appellant's primary care physician

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<sup>1</sup> Docket No. 01-1630 (issued March 15, 2002).

and capable of diagnosing appellant's situation. She opined that appellant developed accelerated hypertension after significant workplace stress.

By decision dated December 6, 2004, the Office denied modification of the December 6, 2002 decision. The Office noted that Dr. Nolfo's opinion was insufficient to establish the claim.

Appellant requested reconsideration on May 20, 2005. She submitted a May 17, 2005 report from Barbara A. Moynihan, Ph.D. and an advanced practice registered nurse. Ms. Moynihan noted that appellant was subjected to harassment which was degrading and humiliating, by Sean Ford, the officer in charge, and her previous supervisor. She advised that appellant had hypertension, heart palpitations, severe incapacitating anxiety, and disabling symptoms which were a result of appellant's treatment resulting in a six-week medical leave of absence. Ms. Moynihan indicated that once appellant was reassigned she was able to "enjoy her work and function at the same level of efficiency as previous to Mr. Ford's position at the [employing establishment]." She opined that appellant's "need for the medical leave of absence was directly related to the hostile and threatening workplace environment created by Mr. Ford's behavior." Ms. Moynihan further indicated that appellant's symptoms met the diagnostic criteria for Adjustment Disorder with Mixed Anxiety and Depressed Mood.

By decision dated October 14, 2005, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that her request failed to show that the Office erroneously applied or interpreted a specific point of law, and failed to advance relevant legal evidence not previously considered, and failed to present relevant and pertinent evidence not previously considered and was thus insufficient to warrant review of its prior decision. The Office specifically noted that the report of Ms. Moynihan was not considered medical evidence.

### **LEGAL PRECEDENT**

Under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

"(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

"(ii) Advances a relevant legal argument not previously considered by the Office; or

"(iii) Constitutes relevant and pertinent new evidence not previously considered by the [the Office]."<sup>3</sup>

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.606(b).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.<sup>4</sup>

### **ANALYSIS**

Appellant disagreed with the Office's December 6, 2004 decision and requested reconsideration on May 20, 2005. The underlying issue on reconsideration was whether appellant's emotional condition was caused or related to a compensable factor of employment. However, appellant did not provide any relevant or pertinent new evidence relevant to the issue of whether her condition was caused or related to a compensable factor of employment. She did not submit any new medical evidence addressing the relationship of an established employment factor and her claimed condition.

In support of her May 20, 2005 request for reconsideration, appellant submitted a May 17, 2005 report from Ms. Moynihan, Ph.D., an advance practice registered nurse. Although she opined that appellant's symptoms were related to severe and relentless harassment from her supervisor, Mr. Ford, her opinion is of no competent medical evidence. There is no evidence to suggest that Ms. Moynihan is a physician as defined by the Act. Section 8101(2) of the Act<sup>5</sup> provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by the applicable state law. Although Ms. Moynihan has a Ph.D., it is not apparent that her degree is in the area of clinical psychology. Her report cannot be considered medical evidence. Ms. Moynihan's report does not otherwise show that the Office erroneously applied or interpreted a specific point of law, nor does it advance a relevant new argument not previously considered by the Office.

Consequently, appellant has not submitted relevant and pertinent new evidence not previously considered by the Office; nor has she shown that the Office erroneously applied or interpreted a specific point of law, or advanced a relevant new argument not previously considered by the Office. Therefore, the Office properly denied her request for reconsideration without conducting a merit review of the claim.

### **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).<sup>6</sup>

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<sup>4</sup> 20 C.F.R. § 10.608(b).

<sup>5</sup> See 5 U.S.C. § 8101(2). See also *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

<sup>6</sup> Following the issuance of the Office's October 14, 2005 decision, appellant submitted additional evidence. However, the Board may not consider this evidence as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. See 20 C.F.R. § 501.2(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 14, 2005 is affirmed.

Issued: May 15, 2006  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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