United States Department of Labor
Employees' Compensation Appeals Board

T.G., Appellant	)	
and	)	**Docket No. 08-1529**
	)	**Issued: July 13, 2009**
U.S. POSTAL SERVICE, NORTH VIEW ANNEX, Lincoln, NE, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 5, 2008 appellant filed a timely appeal from the March 28, 2008 merit decision of an Office of Workers' Compensation Programs hearing representative, finding that he did not sustain an emotional condition in the performance of duty and an April 22, 2008 nonmerit decision, denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

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

FACTUAL HISTORY

On September 1 and 2, 2006 appellant, then a 56-year-old mail carrier, filed occupational disease claims alleging that on July 20, 2005 he became aware of his emotional condition. On July 25, 2005 he realized that his condition was caused by work-related stress. Appellant stated

that management compared his "office time against a computer" and required him to carry his route faster than he was capable of doing.

In an April 4, 2006 letter, Michael Davidson, a union steward, stated that appellant was concerned about the delivery operations information system (DOIS) projections. He stated that every carrier's mail volume was counted by line or feet on a daily basis to calculate an average piece count that was entered into a computer. Based on a combination of letters, flats and fixed office time, an estimate was made of how many hours and minutes it should take a carrier to complete a route. Mr. Davidson contended that the DOIS projections left out several important items. Management entered an average parcel and accountable total which was essentially the same everyday but which varied on certain days. When this occurred, a carrier had to inform a supervisor that the route may not be completed within DOIS projections. Mr. Davidson stated that this caused carriers and management to disagree about how long it should take to deliver a route and resulted in undo stress for carriers.

Appellant submitted medical records dated January 9 through June 29, 2006, which stated that his heart problems, emotional condition and disability were due to work-related stress.

In a letter dated September 6, 2006, Kathi Fensky, an employing establishment injury compensation specialist, controverted appellant's claims. She stated that carrier supervisors used DOIS calculations as the standard of measurement for daily supervision of productivity. These calculations were used to determine the daily volume of mail so that management could make a decision on whether overtime, help or undertime was warranted. Ms. Fensky related that, despite appellant's dislike for being managed in this manner, it was the only way management could effectively and fairly manage the operation. She argued that management had the authority to question and direct conduct and work. Ms. Fensky contended that appellant's reaction was clearly self-generated and he did not submit evidence establishing that management had committed error or abuse.

In narrative statements dated September 18 and 24, 2006, appellant contended that he was harassed by his managers even though they were aware of his medical problems. He noted that management strictly followed the computer figures. On June 21 and 22, 2006 a supervisor trainee informed appellant that he had quite a bit of undertime based on computer data. Appellant replied that he was doing the best he could and that if he had any undertime, he would use sick leave. The supervisor trainee insisted that he perform more work. Appellant became stressed and started shaking. He called in sick on June 23 and 24, 2006. When appellant returned to work on June 27, 2006, a supervisor asked him for a statement from an attending physician regarding his absence from work. He was unaware of this policy. Appellant stated that the supervisor made a bet with another supervisor that he would call in sick. On August 1 and 24, 2006 a station manager repeatedly informed him that he had undertime. Appellant responded that he could not work fast due to his age. He stated that his heart problems only arose at work due to stress from management. On October 6, 2006 appellant added that managers were going to put him in a stressful situation by following him on his route all day.

By letter dated October 11, 2006, the Office requested that the employing establishment respond to appellant's allegations. It also advised him that the evidence submitted was insufficient to establish his claim. The Office requested additional factual and medical evidence.

Appellant submitted medical records dated January 29, 2002 to September 26, 2006, which stated that his heart and emotional conditions were work related.

In an October 16, 2006 letter, Todd N. Case, a manager, and Tami Adams, a supervisor, disagreed with appellant's allegations. Mr. Case stated that Ms. Adams did not actually bet him that appellant would call in sick. She stated, "what do you wanna bet [appellant] calls in sick tomorrow," which was a figure of speech. Mr. Case stated that Ms. Adams made the statement because appellant had previously called in sick after they discussed his work performance with him. He denied repeatedly visiting appellant's case. Mr. Case and Ms. Adams visited each carrier once daily to discuss the plan for the day based on a DOIS data report. He addressed appellant's questions regarding DOIS figures in a nonconfrontational manner. Mr. Case noted that appellant was not being pushed to work while on the street as the DOIS report showed that he experienced difficulty getting out of the office on time. The only time he questioned him about being under time was when a large amount of it was projected. Mr. Case stated that appellant was rarely challenged and management was very hesitant to discuss anything with him because he would react by filing a workers' compensation claim. He stated that proper procedures for managing carriers was followed in planning the one-day mail count and street observation of appellant. Since September 2006, no other carriers who had their routes counted alleged harassment or filed a workers' compensation claim. Mr. Case denied committing any error or abuse.

In an undated letter, appellant stated that he did not take his two 10-minute breaks or lunch in order to perform his work duties.

Narrative statements dated October 16 to December 18, 2006 were submitted from appellant's coworkers, Marlowe M. Polen, Diane Sorenson, Mrs. Mayer, Pat Campbell, Rex Anderson and one person whose signature is illegible. Each stated that their work was stressful as it was demanding and their job performance was evaluated by DOIS data. Supervisors and managers demanded that they follow the rules regarding their delivery responsibilities. Mr. Polen stated that on June 21 and 22, 2006 he heard appellant tell Dick Pavlish, an acting supervisor, that he could not rely on undertime data. On a later date, appellant sounded stressed when Mr. Pavlish again informed him about his undertime. Mr. Polen related that appellant responded that he was doing his best. Mr. Campbell stated that verbal confrontations between letter carriers and supervisors ranged from unpleasant to rude and demoralizing to insulting. Mr. Anderson stated that employees were allowed two 10-minute breaks in the morning before they delivered the mail and one 30-minute lunch break. He related that appellant may have taken a break three times. Appellant told Mr. Anderson that he seldom took breaks so that he could complete his work on time.

In an October 15, 2006 statement, Mr. Davidson related that appellant called in sick on June 23 and 24, 2006 and returned to work on June 27, 2006. Ms. Adams requested that he submit a note from an attending physician before he could return to work. Mr. Davidson stated that appellant was not aware of this policy and became upset about the request. Ms. Adams informed him that a physician's note was not necessary but, he stated that he wanted to submit it anyway. Mr. Davidson also noted that prior to this incident appellant had several disagreements with Mr. Pavlish which caused him to become upset.

In a November 8, 2006 statement, appellant related that he had stopped taking his lunch break because management wanted good statistics no matter the cost. When he tried to take his lunch break at the end of the day, a manager instructed him to take it on his route at his regular time. On December 15, 2006 appellant stated that he could not talk to management because he was afraid of being verbally abused. He contended that Mr. Case failed to follow proper safety procedures while following him on his route. Appellant backed up his vehicle several times while carriers were only allowed to do so when parking a truck at the station. He received a suspension letter for a safety violation committed on his route. Appellant contended that he was verbally and mentally harassed by the supervisor trainee on June 21 or 22, 2006 for being undertime.

On October 31, 2006 the employing establishment advised appellant that he was entitled to leave under the Family and Medical Leave Act (FMLA) during the period October 23 through 29, 2006 for his cardiac and emotional conditions. Appellant contended that he was entitled to additional leave for the period June 23 through July 2, 2006 but, it was not offered to him.

By decision dated January 5, 2007, the Office denied appellant's claim, finding that he did not sustain an emotional condition in the performance of duty. The evidence failed to establish a compensable factor of his employment.

On January 11, 2007 appellant requested an oral hearing before an Office hearing representative. In an undated statement, he alleged that on January 19, 2007, Mr. Case denied his request for emergency sick leave to attend a medical appointment with Dr. Pitsch to discuss his aneurism. Mr. Case told appellant that no one was available to cover his route. He again denied his request for leave in the presence of Kelly Wood, a union steward, which caused him to become stressed. Ms. Wood noted on the statement that she witnessed the conversation between appellant and Mr. Case. On June 23, 2007 appellant contended that the DOIS count did not consider the employing establishment's regulations regarding route examination.

Appellant also contended that he became stressed after Jeff Duba, an employing establishment family medical leave coordinator, informed him that his request for leave under the FMLA for five days per month had been denied by management. He stated that management expected him to produce more work in the Office on May 29, 2007. On that date, appellant experienced heart problems while working on his route and he called the office around 12:00 p.m. Mr. Case came out to his route and took him to a hospital emergency room. Appellant related that on February 26, 2007 he was at his case separating mail that he had brought back from his route when Mr. Pavlisch told him to stop. He contended that Mr. Pavlisch discriminated against him because he did not require Brian Spale, a coworker, to stop sorting his returned mail.

In a July 5, 2006 letter, Michael Holloway, a district manager, note that the DOIS projections were used throughout the United States. He contended that the request for medical documentation in support of appellant's absence from work did not constitute discrimination.

On June 21, 2007 Ms. Wood stated that plenty of eligible employees were available to work overtime to cover appellant's route on January 19, 2007.

On July 9, 2007 appellant contended that Mr. Case had plenty of employees to cover his route, but he did not want to pay overtime.

Appellant subsequently contended that work-related stress caused his heart condition. He stated that on July 20, 2005 a personnel staffer informed him that he could not wear shoes that supported his ankles despite receiving prior approval to wear them from Mr. Case. On October 5, 2005 appellant received approval to wear the shoes after he discovered they were allowed to be worn at another post office. On April 14, 2007 a FMLA coordinator lied to him in stating that his request for leave under the FMLA had been disapproved on April 13, 2007.

In a February 15, 2008 letter, Louise M. Crooks, a safety and injury compensation specialist, stated that appellant received special treatment from his manager due to his reaction to administrative functions he did not like. She related that managers were concerned about his medical condition and immediately provided him with assistance when he requested it. Ms. Crooks stated that they used their own vehicles to transport him to the emergency room. She recommended that appellant seek a light-duty job to accommodate his medical conditions as set forth in his union contract.

On February 12, 2008 Mr. Case denied appellant's allegations of harassment. He stated that managers were trained to treat employees with dignity and respect. Mr. Case noted that scores from an employee survey over the last quarters revealed an improved workplace environment. He implemented weekly "good news" talks to become more proactive in recognizing employees and their contributions. Mr. Case denied that he or any other manager verbally abused appellant. He attributed appellant's emotional condition to nonwork-related stressors, which included arguments with his wife, mother and siblings, being a recovering alcoholic and receiving psychiatric treatment for seasonal depression during the winter. Mr. Case expressed his concern for appellant by going out to his route and taking him to the emergency room. He denied any knowledge of his heart condition. Mr. Case stated that the DOIS was not used to harass appellant and that it was not the sole tool used to determine work hours. Managers asked for carrier input, looked at mail mix, weather conditions, parcel volumes and other carrier projections. Unlike other carriers, appellant received special treatment. Although he stated on numerous occasions that he would use sick leave for his undertime, Mr. Case stated that the majority of the time he never did so and he was not challenged the next day. He related that the DOIS was an approved tool and it projected work hours based on an individual's demonstrated performance. Mr. Case indicated that the program was adjusted to reflect appellant's most recent performance. He discussed appellant's performance with him on several occasions.

On February 14, 2008 Kerry Kowalski, postmaster, stated that the DOIS was a management tool used to estimate carriers' daily workload. Postmaster Kowalski stated that it did not change a letter carrier's reporting requirements or a supervisor's scheduling responsibilities. The DOIS projections were not the sole determinant of the time a carrier left or returned or daily workload and could not be used as the sole basis for corrective action.

On February 18, 2008 appellant stated that he did not know that he could request a light-duty job based on the union contract and denied receiving special treatment from management. He filed a complaint against management on February 5 and 11, 2007 with the

Equal Employment Opportunity Commission (EEOC). Appellant stated that his family stressors occurred 7 to 10 years prior and contended that the discussions with Mr. Case regarding his work performance constituted harassment.

In a February 27, 2008 statement, Jon D. Vance, president of the union, stated that as a result of numerous grievances filed against the employing establishment regarding the DOIS, a settlement agreement had been reached recently. Under the agreement, the DOIS was not the sole determinant of a carrier's leaving or return time or daily workload. It was also not the sole basis for corrective action. Mr. Vance related that prior to the agreement, management informed carriers about their leaving time and total workload for the day without discussion. He stated that management refused the union's request to "lay off" appellant due to his heart condition.

By decision dated March 28, 2008, an Office hearing representative affirmed the January 5, 2007 decision. She found that appellant did not sustain an emotional condition in the performance of duty because he failed to establish a compensable factor of his employment.

In an April 6, 2008 letter, appellant requested reconsideration, questioning advice he received from the Office hearing representative. She noted that he could either appeal her decision or file a complaint with the EEOC. An undated partial decision from the EEOC denied appellant's complaint alleging harassment by management on the grounds that it was untimely filed and failed to state a claim. A letter from a law firm addressed his possible membership in a class action suit filed against the employing establishment.

By decision dated April 22, 2008, the Office denied appellant's request for reconsideration. It found the personal evidence submitted to be irrelevant and insufficient to warrant further merit review of his claim.

LEGAL PRECEDENT -- ISSUE 1

A claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by factors of his federal employment.[1] To establish that he sustained an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) medical evidence establishing that he has an emotional or psychiatric disorder; 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 to the type of employment situations giving rise to a

[1] *Pamela R. Rice*, 38 ECAB 838 (1987).

[2] *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

[3] 28 ECAB 125 (1976).

compensable emotional condition arising under the Federal Employees' Compensation Act.[4] There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or 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 his 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 his emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.[6] There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage under the Act.

In cases involving emotional conditions, the Board has held that, 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.[7] 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]

Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act. 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.[9] Generally, actions of the employing establishment in administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Act.[10] However, 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.[11]

---

[4] 5 U.S.C. §§ 8101-8193.

[5] *See Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

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

[7] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[8] *Id.*

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

[10] *Michael L. Malone*, 46 ECAB 957 (1995).

[11] *Charles D. Edwards*, 55 ECAB 258 (2004).

ANALYSIS -- ISSUE 1

Appellant attributed his emotional condition to harassment discrimination by postal management. He contended that his work performance was compared to DOIS projections that did not consider the employing establishment's regulations regarding route examination. Management required appellant to work faster than his physical capabilities although it was aware of his medical problems. He also alleged that Mr. Pavlish, a supervisor trainee, and Mr. Case, a station manager, verbally abused him about having undertime and insisted that he perform more work. Ms. Adams also bet Mr. Case that he would call in sick. Upon his return to work, management requested that he submit medical documentation for his two-day absence. Appellant was followed on his route by a manager. He also alleged that his work duties prevented him from taking his breaks. Appellant received a suspension letter for committing a safety violation yet Mr. Case committed a safety violation by backing up his vehicle while monitoring appellant on his route. The employing establishment failed to offer him leave under the FMLA for the period June 23 through July 2, 2006. Mr. Duba informed him that his request for five days of leave per month under the FMLA had been denied by management. Mr. Case denied appellant's request for emergency sick leave to attend a medical appointment with Dr. Pitsch concerning his aneurism, stating that no one was available to cover his route. Appellant contended that there were plenty of employees to cover his route. A FMLA coordinator lied to him in stating that his request for leave under the FMLA had been disapproved on April 13, 2007. Appellant stated that Mr. Pavlish instructed him to stop separating the mail returned from his route while he did not require Mr. Spale to stop sorting his returned mail. A personnel staffer denied his request to wear special shoes although he had received prior approval to wear them. Appellant also filed an EEOC complaint against the employing establishment alleging harassment.

The Board notes that verbal abuse or harassment may give rise to coverage under the Act. However, there must be evidence that the implicated acts of harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. A claimant must establish a factual basis for allegations that the claimed emotional condition was caused by factors of employment.[12] The Board finds that appellant has not established that he was harassed, verbally abused or discriminated against by his management or supervisors. Although Mr. Davidson stated that disagreement between carriers and management about DOIS projections caused undue stress on carriers, he did not state that management used the projections to harass appellant. Appellant's statement that verbal abuse by a postmaster towards a union steward caused him to resign does not substantiate his allegation that he was verbally harassed by management. Mr. Campbell's statement that verbal confrontations between letter carriers and supervisors ranged from unpleasant to insulting does not describe any specific instances in which appellant was verbally abused by supervisors. Mr. Calson's statement did not substantiate the stressful working conditions alleged by appellant. Appellant did not submit any evidence to corroborate his allegation that he was treated differently than Mr. Spale when he was ordered to stop separating his returned mail by Mr. Pavlisch. Ms. Crooks and Mr. Case denied

[12] *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990) (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *Pamela R. Rice*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

harassing him, stating that managers were concerned about appellant's medical condition and helped him when requested. When appellant became sick on his route Mr. Case took him to the emergency room. Ms. Crooks recommended that he seek a light-duty job and assistance from the EAP. Mr. Case stated that he trained managers to treat employees with dignity and respect and implemented weekly talks to recognize employees and their contributions. The evidence submitted from appellant's coworker does not address with any specificity the allegations of abuse or harassment related in this claim. The Board finds that appellant has not established a compensable employment factor under the Act with respect to the claimed harassment or discrimination.

Appellant took exception to the monitoring of his work by managers. This pertains to an administrative or a personnel matter, which is noncompensable unless the employee shows that it erred or acted unreasonably.[13] His reaction to what he described as scrutiny is not covered under the Act as he did not submit evidence to establish error or abuse. Ms. Fensky explained that DOIS projections were used to determine carriers' daily mail volume. She stated that this was the only way management could effectively and fairly manage the delivery operation. Mr. Case stated that appellant's projected work hours were based on his demonstrated performance and adjusted to account for variables such as weather, mail mix and carrier input. He discussed his job performance with him on several occasions and he had no animosity towards him. Mr. Case denied excessively visiting his case, noting that he and Ms. Adams visited each carrier once daily to discuss their workload based on DOIS data. He stated that appellant was not pushed to work on his route as the DOIS data showed that he had difficulty getting out of the office on time. Mr. Holloway stated that the DOIS was used throughout the United States. Based on the statements of Ms. Fensky, Mr. Case and Mr. Holloway, the Board finds that appellant has not established a compensable employment factor under the Act with respect to the administrative matter of monitoring his work performance.

Appellant's allegations regarding a request for medical documentation,[14] the issuance of a disciplinary letter,[15] the denial of leave[16] and appropriate equipment such as shoes and the filing of a grievance[17] also relate to administrative and personnel matters. Regarding Ms. Adams' request for medical documentation, Mr. Case noted that her comment to him on whether appellant was going to call in sick was a figure of speech. He stated that Ms. Adams made the statement because appellant had previously called in sick following discussions held with him about his work performance. Mr. Davidson stated that Ms. Adams withdrew her request for medical documentation after appellant became upset. Mr. Holloway denied that he was harassed

[13] *Beverly R. Jones*, 55 ECAB 411, 416 (2004); *Lori A. Facey*, 55 ECAB 217, 224 (2004).

[14] *James P. Guinan*, 51 ECAB 604, 607 (2000); *John Polito*, 50 ECAB 347, 349 (1999).

[15] *See Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[16] *T.G.*, 58 ECAB ___ (Docket No. 06-1411, issued November 28, 2006) (actions of the employing establishment in matters involving the use of leave are generally not considered compensable factors of employment as they are administrative functions of the employer and not duties of the employee).

[17] *Michael A. Salvato*, 53 ECB 666, 668 (2002).

by being required to submit medical documentation to support his use of sick leave. Regarding Mr. Case's denial of appellant's request for emergency sick leave to attend a medical appointment, Ms. Wood stated that there were employees available to cover appellant's route in his absence. Post master Kowalski and Mr. Vance both noted that DOIS projections could not be the sole determinant of when a carrier left or returned or daily workload or the sole basis for corrective action. The settlement argument does not provide any admission or acknowledgment of error by the employing establishment in using the DOIS projectors. Appellant has not submitted any evidence establishing that the employing establishment committed error or abuse in issuing a disciplinary letter or denying his request to wear special shoes. Accordingly, the Board finds that he has not established a compensable factor of employment with respect to administrative matters.[18]

Appellant contended that his emotional condition was caused by overwork. He stated that management insisted that he perform more work even though he had a worsening medical condition. Appellant further stated that he was unable to take his breaks. The Board has held that overwork may be a compensable factor of employment.[19] The Board finds that appellant made general allegations of overwork that are nonspecific and not supported by the evidence of record. Mr. Polen, Ms. Sorenson, Mrs. Mayer, Mr. Campbell and Mr. Anderson generally advised that their jobs were stressful due to a demanding workload and their work performance was evaluated under DOIS data. They did not specifically address appellant's assigned duties or allegations. Mr. Polen stated that he heard him tell Mr. Pavlish that he could not rely on undertime to evaluate his work performance. On another occasion appellant sounded stressed when Mr. Pavlish again informed him about his undertime. This evidence is insufficient to establish error or abuse on the part of Mr. Pavlish in discussing his work. Mr. Anderson stated that appellant may have taken a break three times. Appellant told him that he seldom took breaks so that he could complete his work. Mr. Case stated that his projected work hours were based on his demonstrated performance. Appellant has not submitted sufficient evidence supporting his allegation of overwork. The Board, therefore, finds that he has failed to establish a compensable factor of employment in this regard.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,[20] the Office's regulation 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.[21] To be entitled to a merit review of an Office decision

[18] As appellant has not substantiated a compensable factor of employment as the cause of his emotional condition, the medical evidence regarding appellant's emotional condition need not be addressed. *Karen K. Levene*, 54 ECAB 671 (2003).

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

[20] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the 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).

[21] 20 C.F.R. § 10.606(b)(1)-(2).

denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[22] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS -- ISSUE 2

By letter dated April 6, 2008, appellant disagreed with the denial of his emotional condition claim on the grounds that the evidence of record did not establish any compensable work factors. The Board finds that appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant new argument not previously considered nor did he provide any relevant or pertinent new evidence regarding whether he sustained an emotional condition in the performance of duty.[23]

Appellant expressed frustration in trying to confirm the Office hearing representative's advice to him about filing either an appeal of her decision or an Equal Employment Opportunity claim. The partial EEOC decision denied appellant's harassment complaint as it was not timely filed and failed to state a claim. This evidence is not relevant to the underlying issue in this case, as it does not pertain to the specific allegations raised by appellant. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[24]

Similarly, an August 23, 2008 letter from a law firm that addressed appellant's possible membership in a class action suit is not relevant to the underlying issue. This evidence does not pertain to the allegations raised below. Therefore, the Board finds that the August 23, 2008 letter does not warrant reopening appellant's case for merit review.[25]

The Board finds that appellant did not submit argument or evidence showing that the Office erroneously applied or interpreted a specific point of law; advancing a relevant legal argument not previously considered; or constituting relevant and new pertinent evidence not considered previously by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that his claim is not entitled to further merit review.[26]

---

[22] *Id.* at § 10.607(a).

[23] *See L.H.*, 59 ECAB ___ (Docket No. 07-1191, issued December 10, 2007) (section 10.608(b) of Office regulations provides that when an application for reconsideration 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).

[24] *Patricia G. Aiken*, 57 ECAB 441 (2006).

[25] *Id.*

[26] *See* 20 C.F.R. § 10.608(b); *Richard Yadron*, 57 ECAB 207 (2005).

CONCLUSION

The Board finds that appellant has not established that he sustained an emotional condition while in the performance of duty. The Board further finds that the Office properly denied appellant's request for a merit review of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the April 22 and March 28, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 13, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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