United States Department of Labor
Employees' Compensation Appeals Board

J.T., Appellant	)	
and	)	**Docket No. 08-2394**
	)	**Issued: July 20, 2009**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION CARIBBEAN HEALTHCARE SYSTEM, San Juan, Puerto Rico, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 2, 2008 appellant filed a timely appeal from a May 27, 2008 decision of the Office of Workers' Compensation Programs denying merit review. Because more than one year has elapsed from the last merit decision dated June 21, 2007 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office, in its May 27, 2008 decision, properly denied merit review pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 7, 2007 appellant, then a 37-year-old respiratory therapist, filed a claim for an occupational disease (Form CA-2) alleging that he sustained anxiety, depression and high blood

pressure. The employing establishment signed the form without exception and noted that he stopped work on March 19, 2007 and had not returned.

In a letter dated May 18, 2007, the Office notified appellant of the deficiencies in his claim and requested that he provide additional information.

In a May 7, 2007 statement, appellant claimed that due to the actions of his supervisors he sustained anxiety and depression, causing general anxiety, anxiety attacks, depression, insomnia, headaches, poor concentration and mood swings. He also experienced fear due to his perception that his supervisors acted in a prejudicial manner. Appellant alleged that, since he started working on February 5, 2006, he was the brunt of jokes that denigrated his attempts to improve his Spanish-language fluency. His coworkers described him as "el gringo" and "el disparatero" to patients. Appellant's attempts to express displeasure with these names were met with increased ridicule. He stated that his coworker, Diana Garcia, made negative comments to him about retaining his job. Appellant claimed that he experienced an anxiety attack and sought medical treatment after Ms. Garcia stated, "that [i]s if they are going to keep you," in reference to his upcoming anniversary. He received a termination letter dated January 31, 2007 three days before the end of his probation period on February 2, 2007. Appellant claimed that he did not have any indication that he was not meeting standards prior to the receipt of the termination letter and he never received a formal evaluation. He stated that the reasons given for his termination were misrepresentations of documented facts and that he was the victim of a conspiracy to remove him from his position. With the help of a union representative, the termination letter was rescinded and appellant was able to continue his employment. When he returned to work on February 12, 2007, he was subjected to changes in his job description. Appellant's telemedicine clinics were cancelled without notification and his respiratory supplies were removed from their storage area and not replaced. He was later informed in a March grievance resolution meeting that his equipment was removed because he allegedly stockpiled equipment worth over $40,000.00 in his storage space; however, he claimed this was not possible because of the limited space available. Appellant further contended that he was blamed for performing duties clearly stated in his function statement because his supervisors believed they impinged upon the duties of Ms. Garcia. He maintained that his supervisors neglected to address the seriousness of their actions, or lack thereof, on his physical and emotional well being and that they believed that he would resign if they continue to mistreat him.

In a statement dated June 15, 2007, Dr. William Rodriguez, appellant's supervisor, stated that appellant's statement was mixed with untruthfulness leading to the general idea that he was mistreated. He maintained that, after investigating appellant's claims that he was called "el gringo" and "el disparatero," he found that this was done by veteran patients and not his coworkers. Appellant's coworkers, if anything, corrected the patients on the proper way to address him and further assisted in providing prescriptions to patients when appellant was unavailable. Further, Dr. Rodriguez stated that appellant was not provided a written performance evaluation at the stipulated period of time because there was no section secretary to help in coordinating the report. He had not provided a written report since because of appellant's litigating attitude and prolonged unauthorized absence. Dr. Rodriguez stated that appellant was given feedback repeatedly when he took actions hampering the effectiveness of his job performance. However, appellant did not want to follow instructions and caused accountability problems to the system. These problems were addressed in a meeting with appellant and his

union representative. Appellant had not returned to work since that meeting and further elevated grievance actions. Dr. Rodriguez contended that appellant did not experience any discrimination or intentional ill treatment. He also maintained that appellant failed to follow clearly expressed instructions, endangered human life and disregarded correct administrative procedures.

By decision dated June 21, 2007, the Office denied the claim finding that appellant did not submit any evidence of employing establishment error or abuse regarding the allegation that he was improperly given a termination letter three days prior to the end of his probation period. Thus, this was not a compensable factor of employment. Further, the Office stated that appellant's compensable claims, including that he was the brunt of jokes and called such names as "el gringo," that he was never certain that his performance was meeting employing establishment standards and that his respiratory supplies were removed and not replaced, were controverted by the employing establishment. Because appellant did not submit any witness statements, Equal Employment Opportunity (EEO) or grievance findings in support of his claims, these employment factors remained unverified.

On May 15, 2008 appellant filed a request for reconsideration of the merits. He submitted a statement dated May 13, 2008 alleging that Dr. Rodriguez's statement was filled with mistruths, was not properly investigated by the Office and should not have been used as a basis for the denial of his claim. Appellant also stated that the doctor's statement was not submitted until over 10 days after he filed his claim. Further, Dr. Rodriguez certified the validity of his claim on the back of the claim form and should not have been allowed to change his position afterward.

In an undated letter, appellant stated that his emotional reaction was caused by work factors, which included that his supervisor prevented him from performing his job functions in compliance with his functional statement, he was unfairly restricted to the hospital without justifiable cause, he was forced by his supervisor to deny service to eligible veterans, he was denied mission essential equipment without cause, he was forced to work in a hostile environment, his probationary period was not accompanied by any periodic evaluation and the first written evaluation was in the form of a termination letter, his supervisor acted discriminatorily against him after unsuccessfully attempting to terminate him and the actions against him caused him to lose prestige and the respect of his coworkers. Further, he alleged that managerial error was evident in the wording of the termination letter and the letter rescinding termination. Moreover, the fact that his supervisor was not able to secure his termination was *prima facie* evidence of managerial error. Appellant stated that none of the allegations against him were supported by documentation and alleged that the employing establishment was held to a different standard with regard to proving its allegations.

By decision dated May 27, 2008, the Office denied appellant's request for reconsideration on the grounds that he did not raise substantive or legal questions or include new and relevant evidence.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[2] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[3]

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[4] the Office's regulations provide that the evidence or argument submitted by 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.[5] To be entitled to a merit review of an Office decision 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.[6] 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 on the merits.[7]

ANALYSIS

In the June 27, 2007 decision, the Office denied appellant's claim for an emotional condition on the grounds that he did not submit any evidence of managerial error or abuse to support his allegation that he improperly received a termination letter. It further found that appellant did not submit any evidence to support his other allegations, thus, these work factors remained unverified. The Board finds that appellant did not submit any relevant and pertinent new evidence with his reconsideration request. The issue is whether he advanced a relevant legal argument or showed that the Office erroneously applied or interpreted a point of law.

In an undated letter, appellant reiterated his alleged work factors, including that he was not allowed to perform his job functions in compliance with his functional statement, he was denied mission essential equipment without cause, he was subjected to a hostile work environment, he was not provided any type of periodic evaluation, the termination letter was accompanied by fabrications, he was treated discriminatorily after his supervisor unsuccessfully attempted termination, management conspired with the goal of securing his termination and he

[1] 5 U.S.C. §§ 8101-8193.

[2] *Id*. at § 8128(a).

[3] *Annette Louise*, 54 ECAB 783, 789-90 (2003).

[4] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.606(b)(2).

[6] *Id*. at § 10.607(a).

[7] *Id*. at § 10.608(b).

lost prestige and the respect of his coworkers due to the discriminatory actions of his supervisors. He also alleged new work factors, including that he was unfairly restricted to the hospital without cause and was forced to deny service eligible veterans who requested service. Emotional claims require that a claimant establish a factual basis by supporting allegations with probative and reliable evidence. Perception and feelings alone are not compensable.[8] However, appellant did not include any additional supporting evidence to verify these work factors. The Board finds that the mere statement of previously alleged and new work factors does not address the underlying issue of verification and corroboration and is not sufficient to require the Office to reopen the claim for merit review.[9]

Appellant further contended that the attempted termination itself was in error and this was evident in the wording of the termination letter and letter rescinding termination. He also maintained the fact that he was not terminated established a *prima facie* case of managerial error. The Board finds these arguments are without merit. The record does not contain a copy of the termination letter or the letter rescinding termination, nor did appellant provide copies of these letters with his reconsideration request. Thus, appellant's contention that the wording of these documents shows managerial error is unsupported and without merit. Therefore, his argument that the rescission showed managerial error on its face lacks a reasonable color of validity.[10]

Appellant also alleged that the employing establishment certified the claim form without exception and should not have been allowed to later controvert the claim. He also argued that the employing establishment's statement was filed over 10 days after the claim and should not have been considered as evidence. On his claim form, appellant only alleged that he sustained anxiety, depression and high blood pressure. He did not allege any work factors. Thus, the employing establishment did not change its position by signing the form without exception and later controverting appellant's subsequent statements. Moreover, as appellant did not cite to any law, statute or regulation that would require the employing establishment to submit a statement within 10 days after the claim, his argument lacks a reasonable color of validity.[11]

Finally, appellant contended that the Office did not require the employing establishment to back up its allegations with documentation, thereby unfairly holding it to a different standard than himself. As the Board has held, appellant ultimately has the burden of proving with reliable, probative and substantial evidence the factual aspects of his claim.[12] Further, the Office, in its role as a fact finder, properly requested the employing establishment to comment on

[8] *Margret S. Krzycki*, 43 ECAB 496 (1992).

[9] *See Diedra A. Spencer*, Docket No. 02-991 (issued October 2, 2002) (where the Board found that appellant's listing of new and previously alleged work factors was not sufficient to require the Office to reopen her emotional condition case. The Board determined that the statement described her allegations but did not establish that the alleged employment incidents actually occurred. Thus, it did not constitute relevant evidence.).

[10] While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity. *See Jennifer A. Guillary*, 57 ECAB 485 (2006).

[11] *See Elaine M. Borghini*, 57 ECAB 549 (2006); *John F. Critz*, 44 ECAB 788 (1993).

[12] *See Charles E. Evans*, 48 ECAB 692 (1997).

appellant's statements and the circumstances of the claim.[13] Thus, his argument that the Office unfairly held him to a higher standard to prove his allegations is without merit.

The Board finds that appellant did not advance a relevant legal argument, show that the Office erroneously applied or interpreted a point of law or submit relevant and pertinent new evidence. Thus, the Office properly declined to reopen the claim for further merit review.

CONCLUSION

The Board finds that the Office, in its May 27, 2008 decision, properly denied merit review pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the May 27, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 20, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[13] When working conditions are alleged as factors in causing disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment. When a claimant fails to implicate a specific factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. *See Earl D. Smith*, 48 ECAB 615 (1997). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Obtaining Evidence from Employing Agencies*, Chapter 2.800.7 (April 1993).