# United States Department of
# Employees' Compensation Appeals Board

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| **J.M., Appellant** | ) | |
| **and** | ) | **Docket No. 08-2514** |
| | ) | **Issued: June 22, 2009** |
| **DEPARTMENT OF THE AIR FORCE, AIR LOGISTICS CENTER, HILL AIR FORCE BASE, UT, 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 September 24, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 20, 2007 merit decision denying her emotional condition claim and an August 14, 2008 nonmerit decision denying her request for further review of the merits of her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUES***

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied her request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

### ***FACTUAL HISTORY***

On September 1, 2007 appellant, then a 49-year-old program analyst, filed a claim alleging that she sustained an emotional condition in the performance of duty. She stopped work

on August 23, 2007. In an undated statement, appellant noted that on August 22, 2007 she was informed *via* e-mail that a job swap with another organization had been denied. She stated that her nervous breakdown began when she was asked to move from Building 1146 to Building 1211.[1] Appellant claimed that she was improperly charged with being absent without leave (AWOL) and that physical fitness leave privileges were wrongly taken away for six months. She claimed that Elizabeth Atisme, a supervisor, harassed her by subjecting her to at least a half dozen telephone calls and e-mails per day in order to check the status of projects. Ms. Atisme also harassed her in December 2005 when she discussed the fact that she had not attended division parties. Appellant alleged that Ms. Atisme threatened her with disciplinary action for creating a hostile work environment after she learned that appellant had told a GS-12 level coworker to "do the job herself." Ms. Atisme responded in the negative when she asked if she would ever be promoted in her current job.[2]

In a September 19, 2007 statement, Ms. Atisme stated that she did not approve the job swap requested by appellant because the job transfer gave her limited control over the quality of the employee who would be swapped with appellant. She advised that appellant engineered the initial stages of the potential job swap without her knowledge. The move from Building 1146 to Building 1211 was necessitated by a merger between work units and was only for a temporary period. Ms. Atisme noted that there was a delay before the union contacted appellant regarding the matter because she had been away on military duty. She stated that it was necessary to contact appellant regarding work matters, that the telephone calls and e-mails were collegial in nature, and that appellant initiated a number of the communications. Ms. Atisme discussed appellant's lack of participation at division parties because she had heard that appellant had a conflict with one of the party hosts and she wished to help promote a harmonious work environment. She spoke to appellant after it was reported that appellant told a GS-12 level coworker to "quit being lazy and do your job." During the conversation, Ms. Atisme discovered that appellant wished to be promoted to the GS-12 level. She advised appellant that she could possibly be upgraded to the GS-12 level if additional responsibilities were added to her position.

In an October 15, 2007 letter, the Office requested that appellant submit additional factual and medical evidence in support of her claim. Appellant submitted additional medical evidence.

In a November 15, 2007 statement, Ms. Atisme indicated that appellant was disciplined for abusing the physical fitness leave program. On several occasions, she was seen conducting personal errands off the employing establishment premises in violation of the leave program agreement.[3]

[1] Appellant indicated that it took a month before the union contacted her regarding the move and she noted that she told the union that she approved of the move.

[2] Appellant submitted medical evidence concerning her emotional condition.

[3] A description of appellant's job duties and documents regarding the physical fitness leave program were added to the record.

In a December 20, 2007 decision, the Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. It found she did not establish harassment or wrongdoing in connection with any administrative matter.

On May 30, 2008 appellant requested reconsideration of her claim. She submitted October 1 and December 21, 2007 reports of Dr. Richard Charlat, an attending Board-certified psychiatrist. In an August 14, 2008 decision, the Office denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. 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 of workers' compensation. Where the disability results from an employee's emotional reaction to her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[4] 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.[5]

A claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by employment factors.[6] This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[7]

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.[8] 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

[4] 5 U.S.C. §§ 8101-8193.

[5] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[6] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[7] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

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

record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[9]

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

Appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. The Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant did not attribute her emotional condition to her regular or specially assigned duties as a program analyst. Rather she alleged that a job swap with another organization had been improperly denied and that she should not have been asked to move from Building 1146 to Building 1211. Appellant claimed that she was improperly charged with being AWOL and that physical fitness leave privileges were wrongly taken away for six months. She claimed that Ms. Atisme, a supervisor, threatened her with disciplinary action after she heard that appellant told a GS-12 level coworker to "do the job herself." Appellant alleged that Ms. Atisme responded in the negative when she asked if she would ever be promoted in her current job.

Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions, wrongly denied leave and work transfers, improperly moved her work site and wrongly precluded her promotion chances, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[10] Although such matters are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.[11] The Board has found that 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. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[12]

Appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters. For example, she did not submit the findings of any grievance which found wrongdoing by her supervisor. Ms. Atisme indicated that appellant was disciplined for abusing the physical fitness leave program because, on several occasions, she was seen conducting personal errands off the employing establishment premises. She did not approve appellant's requested job swap because the job transfer would provide only limited control over the quality of the employee who would be swapped with

[9] *Id.*

[10] *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).

[11] *Id.*

[12] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

appellant. Ms. Atisme noted that the move from Building 1146 to Building 1211 was necessitated by a merger between work units and was only for a temporary period. She spoke to appellant after she received a credible report that appellant told a GS-12 level coworker to "quit being lazy and do your job."[13] The Board finds that appellant did not show error or abuse by Ms. Atisme in any of these administrative actions. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

Appellant also alleged that she was harassed by Ms. Atisme. She claimed that Ms. Atisme harassed her by subjecting her to at least a half dozen telephone calls and e-mails per day in order to check the status of projects. Ms. Atisme also harassed her in December 2005 when she discussed the fact that she had not attended division parties. To the extent that disputes and incidents alleged as constituting harassment by supervisors is established as occurring and arising from appellant's performance of his regular duties, this could constitute an employment factor.[14] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[15]

The employing establishment denied that appellant was subjected to harassment and appellant has not submitted sufficient evidence to establish that she was harassed.[16] Appellant alleged that Ms. Atisme made statements and engaged in actions which she believed constituted harassment, but she provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.[17] Ms. Atisme indicated that it was necessary to contact appellant regarding work matters, that the telephone calls and e-mails were collegial in nature, and that appellant had initiated a number of the communications. She explained that she discussed appellant's lack of participation at division parties because she had heard that appellant had a conflict with one of the party hosts and Ms. Atisme wished to help promote a harmonious work environment. Appellant has not established a compensable employment factor under the Act with respect to the claimed harassment.

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.[18]

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[13] During the ensuing conversation, she advised appellant that she possibly could be upgraded to the GS-12 level if additional responsibilities were added to her position.

[14] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[15] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[16] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[17] *See William P. George*, 43 ECAB 1159, 1167 (1992).

[18] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

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

To require the Office to reopen a case for merit review under section 8128(a) of Act,[19] 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.[20] 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.[21] 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.[22] The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[23]

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

In connection with her May 30, 2008 reconsideration request, appellant submitted October 1 and December 21, 2007 reports of Dr. Charlat, an attending Board-certified psychiatrist. However, the submission of this evidence does not require reopening of appellant's claim because it is not relevant to the issue of this case. Appellant's emotional condition claim was denied on a factual rather than a medical basis, *i.e.*, she did not establish any compensation employment factors.[24]

Appellant has not established that the Office improperly denied her request for further review of the merits of its December 20, 2007 decision under section 8128(a) of the Act, because the evidence and argument she submitted did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or constitute relevant and pertinent new evidence not previously considered by the Office.

## ***CONCLUSION***

The Board finds that appellant did not meet her burden of proof to establish that she sustained an emotional condition in the performance of duty. The Board further finds that the

[19] 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).

[20] 20 C.F.R. § 10.606(b)(2).

[21] *Id.* at § 10.607(a).

[22] *Id.* at § 10.608(b).

[23] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[24] When a claimant has not established any compensable employment factors, it is not necessary to consider the medical evidence of record. *See supra* note 17.

Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' August 14, 2008 and December 20, 2007 decisions are affirmed.

Issued: June 22, 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