

FACTUAL HISTORY

On June 4, 2008 appellant, then a 40-year-old safety specialist, filed an occupational disease or illness claim (Form CA-2) alleging that she sustained injuries causally related to her federal employment. On the claim form she alleged stress from a hostile work environment created by a supervisor and coworker. Appellant indicated that the stress had contributed to a gluten allergy condition (celiac sprue). In a September 16, 2008 letter, she alleged that the stress had led to a perforated ulcer on June 21, 2008.

The record contains a November 6, 2008 statement from appellant entitled an “EEO [Equal Employment Opportunity] Formal Response” providing allegations of age, sex and disability discrimination. Appellant also submitted medical evidence regarding her treatment for celiac sprue and a laparotomy with partial distal gastrectomy performed on June 28, 2008. In a July 10, 2008 report, the attending surgeon, Dr. David Rodriguez, noted that she had been taking ibuprofen and given the pathology findings and history of ibuprofen use, the ulcer and perforation were likely related to NSAID (nonsteroidal anti-inflammatory drugs) use.

By decision dated January 15, 2009, the Office denied the claim for compensation. It found that no compensable work factors had been established. In addition, the Office noted that the medical evidence indicated that the perforated ulcer was caused by medication.

On January 20, 2009 the Office received a January 13, 2009 letter from appellant regarding her claim. Appellant discussed her allegations that she was not treated as a professional by the supervisor and coworker.

On February 13, 2009 appellant requested reconsideration of her claim. She noted that she had submitted a letter dated prior to the Office decision. Appellant also stated that the “diagnosis” made by the Office was incorrect, as Dr. Rodriguez did not know her medical history. She reiterated her belief that stress caused her perforated ulcer. With respect to additional evidence, appellant submitted a witness statement dated February 13, 2009 from a coworker, Darriel Caston, who stated that she had been a witness in his EEO claim. Mr. Caston stated that appellant continued to be subject to retaliation for her participation in his EEO claim. Appellant also submitted medical evidence, including diagnostic testing and an April 8, 2009 report from Dr. Neal Present, an occupational medicine specialist, who stated that she suffered from several conditions and recommended applying for Office of Personnel Management disability. On March 30, 2009 appellant submitted a video recording of a dedication ceremony with speakers that included a project engineer. She stated that the recording showed she was given no credit being project manager.

By decision dated May 13, 2009, the Office found that the application for reconsideration was insufficient to warrant merit review of the claim.

LEGAL PRECEDENT

The Federal Employees’ Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative)

who receives an adverse decision.² The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the “application for reconsideration.”³

To require the Office to reopen a case for merit review under 5 U.S.C. § 8128(a), the Office’s regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either “(1) shows that [the Office] erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by [the Office]; or (3) constitutes relevant and pertinent evidence not previously considered by [the Office].”⁴ Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.⁵

ANALYSIS

Appellant submitted a February 13, 2009 application for reconsideration, noting that she had submitted a statement dated prior to the January 15, 2009 merit decision. Her January 13, 2009 letter was not received by the Office until January 20, 2009 and therefore it was not considered by the Office in the merit decision. The January 13, 2009 statement does not constitute new and relevant evidence, as it discusses generally appellant’s allegations without providing probative evidence supporting a compensable work factor. The claim in this case was denied on the grounds that there was no compensable work factor established.

Appellant also argued in her application for reconsideration that the Office had improperly relied on the opinion of Dr. Rodriguez, who performed the June 28, 2008 surgery and opined that the perforated ulcer was likely caused by anti-inflammatory medication. The Board notes that she has claimed that she suffered stress at work and the stress contributed to the perforated ulcer. In such a case appellant must first allege and substantiate a compensable work factor.⁶ Once a compensable work factor is established, then the medical evidence is reviewed on the issue of causal relationship between a diagnosed condition and the compensable work factor.⁷ The January 15, 2009 decision reviewed the medical evidence only to illustrate that, even if a compensable work factor had been established, Dr. Rodriguez did not support causal relationship with employment.

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.605 (1999).

⁴ *Id.* at § 10.606(b)(2).

⁵ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁶ *See, e.g., Doretha M. Belnavis*, 57 ECAB 311 (2006). An administrative or personnel matter may be a compensable factor of employment where the evidence discloses error or abuse by the employing establishment. *Id.*

⁷ *Id.*

The Board accordingly finds that appellant did not show the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. With respect to the submission of new evidence, the January 13, 2009 statement was not, as noted above, new and relevant evidence. Appellant submitted new medical evidence, including diagnostic tests, but again the medical evidence is not relevant until a compensable work factor is substantiated. A witness statement from coworker Mr. Caston made a general allegation that she was subject to retaliation for being a witness in his EEO claim. The witness did not provide specific and detailed evidence that constitutes relevant and pertinent evidence regarding a compensable work factor. The video recording shows speakers at a dedication ceremony which appellant asserts shows she was not given credit as being a project manager. To the extent appellant is alleging error by the employing establishment, the video does not provide pertinent evidence supporting a compensable work factor.

Appellant therefore is found not to have met any of the requirements of 20 C.F.R. § 606(b)(2). She 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 submit relevant and pertinent evidence not previously considered by the Office. Pursuant to 20 C.F.R. § 608, the Office properly declined to reopen the case for merit review.

On appeal, appellant discusses the medical evidence and states that her case was mostly decided by the report of Dr. Rodriguez. As noted above, the case was not decided on the medical evidence but on the lack of a compensable work factor. The only issue before the Board is whether the application for reconsideration met one of the requirements of 20 C.F.R. § 10.606(b)(2). For the reasons noted, the Board finds that appellant's application did not warrant merit review.

CONCLUSION

The Board finds that the Office properly determined that appellant's application for reconsideration was insufficient to warrant merit review of the claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 13, 2009 is affirmed.

Issued: June 17, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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