

**United States Department of Labor
Employees' Compensation Appeals Board**

D.B., Appellant)
)
and)
)
DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Columbia, SC, Employer)

Docket No. 10-447
Issued: September 23, 2010

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 7, 2009 appellant filed a timely appeal of a July 9, 2009 decision of the Office of Workers' Compensation Programs denying her request for reconsideration without a merit review. Because more than 180 days has elapsed from the last merit decision dated January 16, 2009 to the filing of this appeal on December 7, 2009, the Board lacks jurisdiction over the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration without further merit review under 5 U.S.C. § 8128.

FACTUAL HISTORY

On July 18, 2008 appellant, then a 53-year-old nurse, filed an occupational disease claim alleging that she developed depression, panic attacks, and stress due to "people at work and being stress out" as well as being discriminated against at work. She first realized that her

condition was caused or aggravated by her employment activities on August 1, 2006.¹ Appellant did not stop work. The employing establishment controverted the claim.

After the Office advised appellant of the factual and medical evidence necessary to establish her claim, she submitted documents pertaining to her Equal Employment Opportunity (EEO) complaint dated between March 22, 2002 and February 15, 2008. These documents included counselor's reports, complaints, decisions, orders and a settlement agreement. These January 5, 2005 and June 30, 2006 decisions of an EEO Commission administrative judge found that appellant had not been discriminated against as alleged. Appellant also submitted proficiency reports from the Veterans Administration (VA) dated June 28, 2001 to November 22, 2006. The record also contains several letters and e-mail correspondences between appellant and her supervisors regarding her requests for leave without pay dated between March 29 and December 12, 2005.

In an August 14, 2008 statement, appellant noted that she had provided descriptions of practices, incidents and confrontations that affected her condition, but that she would be submitting more evidence. She was offered jobs that she was unable to perform due to three workers' compensation injuries for which she was being treated. Appellant also noted that her father had passed away three years prior causing her stress and that she was previously treated by a psychotherapist. She became agitated when dealing with people or claims examiners. In a statement dated July 7, 2008, appellant noted working as a nurse at the employing establishment for 22 years. She also noted working hard "while continuing to be overlooked." Appellant filed a claim for discrimination with the EEO Commission in August 2006, which was denied. She described the types of positions she held at the employing establishment and the duties performed at each. Appellant also noted stress from the workers' compensation claims process.²

In a May 13, 2008 report, Dr. Rodney Fitzgibbon, II, Board-certified in family medicine, noted treating appellant for depression and anxiety since January 2007. He indicated that appellant was currently being treated by psychiatry specialists and would need treatment indefinitely.

The record contains several modified job offers dated between December 21, 2005 and April 6, 2006 as well as appellant's statements declining these offers dated March 3 and October 18, 2006. Appellant also continued submitting EEO and VA decisions.

An August 24, 2005 unsigned work status form indicated that appellant was medically qualified to perform work duties but required restrictions. A September 12, 2005 unsigned work status form diagnosed impingement syndrome and advised that appellant could work with restrictions.

¹ Appellant subsequently amended her statement to indicate that she first realized this condition on August 1, 2005.

² Appellant indicated that the stress was caused by a prior claim, which the Office accepted for right lateral epicondylitis. That claim was assigned case number xxxxxx447 and has previously been before the Board in docket number 09-1952. Case number xxxxxx447 is not before the Board on the present appeal.

Appellant submitted psychiatric treatment notes from Dr. Timothy Malone, a Board-certified psychiatrist, dated between January 4, 2004 and February 13, 2008.

In a January 16, 2009 decision, the Office denied appellant's claim finding that she did not sustain an emotional condition related to factors of employments within the performance of duty. It found that, because appellant did not establish any compensable factors of employment, it was not necessary to address the medical evidence.

Appellant requested reconsideration on June 25, 2009. In a statement dated June 23, 2009, she asserted that the claims examiner based the denial of her claim on the fact that her EEO claim had been denied. Appellant also noted that the claims examiner stated that she would have accepted appellant's claim for stress if her EEO claim had been accepted.

In support of her reconsideration request, appellant submitted a June 18, 2009 report from Dr. Malone who noted that appellant had been under his care since 2004. He diagnosed depression and indicated that he treated appellant on a regular basis for medical management. Dr. Malone opined that due to stress from appellant's medical and psychiatric issues and daily work stressors, she was unable to work. He also opined that appellant should be strongly considered for disability.

In a July 9, 2009 decision, the Office denied reconsideration without a merit review, finding that the new evidence was not relevant to the issue in the present claim.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a), 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.³ Section 10.608(b) of Office regulations provide 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.⁴

ANALYSIS

Appellant's reconsideration request consists of a statement asserting that the Office denied her claim because her EEO complaint had also been denied. She also asserted that the claims examiner would have accepted her emotional condition claim if her EEO claim had been accepted. However, neither of these assertions satisfies the criteria necessary to reopen a case for merit review as they do not show that the Office erroneously applied a specific point of law and they do not advance any new legal arguments. Moreover, appellant's assertions are broad and general statements unsupported by any evidence of record. While a reopening of a case may

³ *D.K.*, 59 ECAB ____ (Docket No. 07-1441, issued October 22, 2007).

⁴ *K.H.*, 59 ECAB ____ (Docket No. 07-2265, issued April 28, 2008).

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.⁵

Although Dr. Malone's June 18, 2009 report constitutes new evidence, it is not relevant to the issue on which her claim was denied. It does not address the underlying issue, which is factual in nature, regarding whether the evidence establishes a compensable employment factor in appellant's emotional condition claim. The Board has held that evidence that does not address the pertinent issue in a claim does not warrant a reopening of the case for a merit review.⁶

For these reasons, the Office properly denied a merit review of appellant's claim as she did not meet one of the three regulatory criteria for reopening her claim for a merit review.

On appeal, appellant asserts that she has been discriminated against, harassed and assigned jobs without training that white coworkers refused to perform. She further asserts that her psychiatrist advised that her job causes stress, anxiety, panic attacks and depression. Appellant has filed over six EEO claims and that the first claim had been settled. The Board, however, only has jurisdiction to consider whether the July 9, 2009 Office decision properly denied further merit review of her claim. As noted, appellant has not shown that the Office erroneously applied or interpreted a specific point of law, advanced a relevant legal argument not previously considered by the Office or submitted new and relevant evidence not previously considered.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration without a merit review.

⁵ *Elaine M. Borghini*, 57 ECAB 549 (2006).

⁶ *See E.M.*, 60 ECAB ____ (Docket No. 09-39, issued March 3, 2009) (where the Board held that new evidence submitted upon a reconsideration request that does not address the pertinent issue is not relevant evidence).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated July 9, 2009 is affirmed.

Issued: September 23, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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