United States Department of Labor
Employees' Compensation Appeals Board

D.H., Appellant	)	
and	)	**Docket No. 10-697**
	)	**Issued: September 13, 2010**
DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, Klamath Falls, OR, Employer	)	

Appearances:
Brook Beesley, Esq., for the appellant
No appearance, for the Director

Oral Argument May 6, 2010

DECISION AND ORDER

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

JURISDICTION

On January 11, 2010 appellant, through his representative, filed a timely appeal from a September 1, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. The last merit decision was an August 14, 2008 Office decision denying appellant's emotional condition claim. Because more than one year elapsed between the most recent merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of this case.[1]

ISSUE

The issue is whether the Office properly declined to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

[1] For Office decisions issued prior to November 19, 2008 a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

FACTUAL HISTORY

On December 31, 2007 appellant, then a 55-year-old mail and file clerk, filed an occupational disease claim alleging that on December 21, 2007 he first realized that his stress, emotional abuse and mental anguish were employment related. He reported to work on December 21, 2007 and informed Pablo Arroyave, a manager, about being overwhelmed by his emotions and that he needed help. Appellant was placed on administrative leave.

In a February 21, 2008 letter, the Office informed appellant that the evidence of record was insufficient to support his claim. It advised him as to the medical and factual evidence to submit.

The evidence included various statements from appellant regarding alleged incidents occurring from November to December 2006 and March 20 and September 19, 2007; a December 21, 2007 mental intake assessment from SkyLakes Medical Center; a March 21, 2007 counseling report; and August 29, 2007 report from Cynthia Bourgeau, a licensed clinical social worker; progress notes from January 23, 2007 to February 20, 2008; an April 10, 2007 report diagnosing depression and post-traumatic stress disorder and progress notes dated September 4, 2002 and January 23, 2007 from Kelvan J. Olson, psychiatric mental health nurse practitioner; a police officer's December 21, 2007 report of custody of an allegedly mentally ill person; a December 22, 2007 hospital report; a written verbal warning given to appellant regarding his behavior and work; Equal Employment Opportunity (EEO) complaint documents concerning his allegations of harassment, hostile work environment and age discrimination; and a February 11, 2008 employing establishment's response to appellant's allegations.

In an undated statement, appellant alleged discrimination based on his age, physical and mental impairments and a hostile work environment. On December 4, 2006 he asked Cheryl Huelker, his supervisor, about attending a leadership class. Appellant alleged that she cut him off from discussing what he had heard about the course, that she was rude, interrupted him while he was speaking and stated that she just wanted the training form he had for another employee who was attending the class. He also alleged that on that day he was given a copy of his workers' compensation claim by a coworker who found it lying on a table in a conference room.

In a January 21, 2007 statement, appellant alleged that he was subjected to harassment and a hostile work environment by Ms. Huelker from November to December 2006. He addressed concerns about a coworker's behavior he had noticed and what he had heard about this employee from another coworker with Ms. Huelker. Appellant wanted Ms. Huelker to be informed and to prevent the behavior from blowing up. He alleged that at a training class on November 14, 2006 Ms. Huelker was short with him and standoffish when he asked her a question. Appellant alleged that she began sending him emails the following week which corrected everything he did. On November 22, 2006 he alleged that Ms. Huelker became belligerent with him after she came into his office. Appellant had injured his back and was off work until November 30, 2006 and alleged harassment about physician's notes during this time. Upon his return to the office, Ms. Huelker immediately inquired about his release back to work. On December 7, 2006 appellant related that she informed him that she was dissatisfied with his work and provided a report detailing her assessment of his work.

In a March 21, 2007 statement, appellant alleged that on March 20, 2007 he was subjected to discrimination by Ms. Huelker when called into her office to discuss a complaint by Jennifer Birri, a coworker, regarding appellant providing personal information about her in a meeting and Customer Service Class for Ms. Birri.

In other statements, appellant detailed multiple incidents occurring from March 22 through 3l, 2007 involving Ms. Huelker's rude behavior and mistreatment over his work and his time card, an SF50 for Ms. Birri left on his desk with her social security number and her comment about him and another employee being sick on the same day. He accused Ms. Huelker of violating the Privacy Act by leaving social security numbers accessible for view by other employees and of making a big deal about errors he made in the FPPS system. Appellant was counseled in front of another employee, she questioned him about a typewriter and his ability to use it correctly, the correct processing of correspondence and mail and meetings regarding his accommodation requests

Appellant also alleged that Ms. Huelker approached him to discuss proper mail routing procedures on September 19, 2007 and mail received that had postage due.

On December 18 and 20, 2007 appellant alleged incidents of harassment by Ms. Huelker during the period July 30 to December 20, 2007. He was told by a coworker that he was being videotaped by the employing establishment. Appellant alleged that Ms. Huelker was rude to him on various days and she complained about him processing mail and other work duties. He was accused of losing a 10-minute trainer program, which Ms. Huelker had not authorized and stated he would have to pay for.

In a February 11, 2008 statement, Ms. Huelker responded on behalf of the employing establishment to appellant' allegations. She noted that he was hired in September 2005 as mail and file clerk and that she trained him in his job duties. In early 2006, appellant and a coworker began talking and complaining about a fellow coworker who had drug abuse problems. He complained to Ms. Huelker about this coworker and his perception that there were no repercussions for her actions, which he believed included lying on her timesheet. Ms. Huelker counseled appellant about improperly sharing personal information about this employee and tracking her time. She stated that his duty of ordering office supplies was not taken away from him. When Ms. Huelker addressed what she believed to be unprofessional behavior and insubordination in refusing to order a clock for a manager, appellant characterized it as harassment. On November 2, 2006 she had a meeting with him to discuss his list of complaints. These included: coworkers taking long lunches; Ms. Huelker micromanaging him; telling him to stop split purchases over $10,000.00 on his bank card; telling him to stop ordering from a company which caused him to feel threatened; that appellant retake bank card training and complete a bank card purchase log; that cell phones should be banned in the office; coworkers should have to give 48 hours notice when requesting leave; the denial of appellant's request to use advanced sick leave for surgery as he had leave available; appellant not issuing an ID badge to a new area manager and; in December 2006, a discussion with appellant regarding his poor performance and conduct.

When Ms. Huelker learned that appellant had post-traumatic stress disorder she provided information on reasonable accommodation. She noted that he disagreed with his performance

rating and requested reconsideration on February 6, 2007. Later that month appellant filed an EEO complaint against her. In March 2007, Ms. Huelker became aware that he had shared personal and private information regarding an employee with a contract instructor and community college representative. After an investigation, she proposed that appellant be given a two-day suspension for which she gave him notice on April 13, 2007. On April 13, 2007 he lodged a complaint against her for Privacy Act violations. Ms. Huelker noted that an investigation by her supervisor found appellant's allegations against her to be meritless and unfounded. In early May 2007, she met with him and an employee relations specialist to discuss his request for reasonable accommodation. A decision was made to develop a desk reference. Appellant subsequently requested retirement training but it was being held at another office that did not allow employees to attend. Ms. Huelker noted that he did not understand why she denied his training request. She denied appellant's request to attend training in National Archives and Records Administration on the grounds that it was above his current position needs. Ms. Huelker provided details regarding the alleged incidents of August 14, 22 and September 19, 2007. On November 14, 2007 appellant ordered $144.12 of bathroom air freshener and dispenser under another coworkers name. On December 20, 2007 Ms. Huelker met with him and two other managers to listen to an audiotape of him impersonating a coworker when he placed the order.

In an August 14, 2008 decision, the Office denied appellant's emotional condition claim. It found that he had failed to establish any compensable factors of employment. The Office found that the allegations of appellant were either uncorroborated or the evidence failed to establish error or abuse on the part of his supervisors in administrative matters.

Subsequent to the decision, the Office received a January 7, 2008 report from Michael Lee, a medical student, diagnosing stress due to work harassment.

On August 5, 2009 appellant's representative requested reconsideration. He submitted a January 13, 2009 report from Peter Eugene Calvo, Psy.D and the September 26, 2008 deposition of Ms. Huelker. He contended that she acted erroneously in her supervisory capacity towards appellant.

Dr. Calvo noted appellant was seen in a group counseling session and diagnosed chronic post-traumatic stress disorder. He noted that appellant filed a claim against the employing establishment for harassment and wrongful termination.

In the deposition Ms. Huelker related investigating the purchase of $147.00 of bathroom air freshener and discovering that it was made under another coworker's name but appellant was the person who actually placed the order. She provided testimony similar to the information previously submitted regarding his suspension for sharing personal information regarding a coworker to two outside sources. Ms. Huelker addressed regarding appellant's request for a reasonable accommodation for his post-traumatic stress disorder. She noted a plan was developed by which a desk reference addressing his daily job duties was put together.

By decision dated September 1, 2009, the Office denied appellant's request for reconsideration. It found the evidence submitted by him was repetitious and insufficient to warrant a merit review.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office's regulations 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.[3] 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.[4] 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.[5]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[6] The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[7]

ANALYSIS

The only decision on appeal is the nonmerit decision of September 1, 2009, denying appellant's application for reconsideration of the Office's August 14, 2008 decision denying his emotional condition claim. The issue at the time of the most recent merit decision was whether he established any compensable factors of employment. To be relevant, the evidence submitted in support of the request for reconsideration, which was received on August 11, 2009, must address that issue.

In support of his request for reconsideration appellant submitted a September 26, 2008 deposition of Ms. Huelker and a January 13, 2009 report from Dr. Calvo, a treating psychologist. Appellant's representative contended that Ms. Huelker's deposition corroborated some of the events the Office denied as uncorroborated in the August 14, 2008 decision and established error and abuse in her supervision of appellant. He contended that the deposition constituted new and relevant information which the Office failed to properly consider and evaluate. Contrary to appellant's assertion, a review of Ms. Huelker's deposition reveals she provided no new or

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[2] 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.

[3] 20 C.F.R. § 10.606(b)(2). *See J.M.*, 60 ECAB ___ (Docket No. 09-218, issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

[4] *Id.* at § 10.607(a). *See S.J.*, 60 ECAB ___ (Docket No. 08-2048, issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

[5] *Id.* at § 10.608(b). *See Y.S.*, 60 ECAB ___ (Docket No. 08-440, issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

[6] *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

[7] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

relevant information regarding his allegations. Ms. Huelker's testimony is essentially duplicative of information she provided in her statements of record. She did not provide testimony establishing error or abuse on her part. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[8] Ms. Huelker's September 26, 2008 deposition is repetitive of her March 21, 2007 statement that was previously of record and considered by the Office in its prior decision. It does not constitute relevant and pertinent new evidence not previously considered by the Office.

Dr. Calvo's January 13, 2009 report stated that appellant suffered from post-traumatic stress disorder. The Office, however, is not required to consider medical evidence in an emotional condition case where no work factors have been established.[9] Dr. Calvo's report, consequently, is not relevant to the underlying issue in this case, which is the factual question of whether appellant has established a compensable factor of employment. 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.[10]

The Board finds that appellant did not submit arguments 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.[11]

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

[8] *See J.M., supra* note 3; *James W. Scott*, 55 ECAB 606, 608 n.4 (2004); *Freddie Mosley*, 54 ECAB 255 (2002).

[9] *See Richard Yadron*, 57 ECAB 207 (2005).

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

[11] *See* 20 C.F.R. § 10.608(b); *Richard Yadron*, *supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 1, 2009 is affirmed.

Issued: September 13, 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